



1941

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## Recommended Citation

Larson, Lennart Vernon (1941) "Labor Warfare and the Anti-Injunction Laws," *Kentucky Law Journal*: Vol. 29 : Iss. 4 , Article 3.  
Available at: <https://uknowledge.uky.edu/klj/vol29/iss4/3>

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# LABOR WARFARE AND THE ANTI-INJUNCTION LAWS

By LENNART VERNON LARSON\*

## I

More than any other comparable period of time the past decade has marked a new era for the advocates of labor. It is a decade which has seen the enactment of the federal anti-injunction law<sup>1</sup> and the National Labor Relations Act,<sup>2</sup> as well as other legislation in which labor has a vital interest. Several of the states have emulated the federal government and have passed labor relations acts<sup>3</sup> and anti-injunction laws. It is proposed in this paper to demonstrate the effect of this legislation on the injunction in labor warfare.

Traditionally, labor warfare has been thought of as having two aspects, both of which must be lawful in order that it may remain free from injunction. These aspects are the purposes of the warfare and the means used to attain them. The procedure of equity courts in inquiring into the lawfulness of objects and of means is derived from the old criminal conspiracy cases involving labor disputes.

Whether a combination of laborers for the purpose of raising wages or lowering hours was a criminal conspiracy at early common law and apart from statute has been subject of controversy.<sup>4</sup> At all events, during the latter half of the

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<sup>1</sup> Also known as the Norris-LaGuardia Act; 47 Stat. L. 70 (1932), 29 U. S. C. A., §§ 101-115.

<sup>2</sup> Also known as the Wagner Act; 49 Stat. L. 449 (1935), 29 U. S. C. A., §§ 151-166.

<sup>3</sup> Mass. Ann. Laws (Supp. 1937), ch. 150A (Laws 1937, ch. 436), repealed and re-enacted by Laws 1938, ch. 345, amended by Laws 1939, ch. 318; Mich. Laws 1939, Public Act No. 176, §§ 1-21; Minn. Laws 1939, ch. 440; 30 N. Y. Consol. Laws (McKinney, Supp. 1937), §§ 700-716 (Laws 1937, ch. 443); 43 Purdon's Pa. Stat. Ann., 1939 Cum. Pocket Part, §§ 211.1-211.13 (1937 P. L. 1168, ch. 294; amended by Laws 1939, Act No. 162); Utah Laws 1937, ch. 55; Wis. Stat. (1939), §§ 111.01-111.20 (Laws 1939, ch. 57). Anti-injunction laws are cited note 12, *infra*.

<sup>4</sup> Landis, Cases on Labor Law, ch. I, pp. 4, 5; Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922).

seventeenth century, and throughout the eighteenth, the English common law was unequivocal in condemning such combinations as criminal conspiracies.<sup>5</sup> It is reasonable to suppose that this view was carried over to the English colonies in America and that it became a part of the common law throughout the United States. Since 1800 it appears doubtful that a decision has been handed down in which the holding that a combination of laborers for better wages and hours is a criminal conspiracy was necessary to the result.<sup>6</sup> Nevertheless, frequent strong *dicta* in the early nineteenth century indicated that this view was of some currency in juristic circles. Since the Civil War the doctrine has had no support, and convictions for criminal conspiracy have been sustained because of other purposes unlawful in character, or because of unlawful means.

The land mark case of *Commonwealth v. Hunt*<sup>7</sup> is distinguished for its "liberality" of result in holding non-criminal a combination to refuse to work for an employer who hires nonunion help and to cause the discharge of a specified nonunion worker. Of equal distinction is its notable exposition of the theory of means and ends of a combination in determining whether a criminal conspiracy exists or not. When in the late 1870's and during the 1880's the labor injunction first came into prominence in dealing with labor disputes, it was natural that the theory of conspiracy be utilized.<sup>8</sup> Whether the injunction should issue or not depended upon whether an unlawful conspiracy existed; and the combination was unlawful (1) if a purpose was illegal or (2) if means used to attain it were un-

<sup>5</sup> In this condition the English common law remained until the Combination Act of 1824. 5 Geo. IV, ch. 95. This legislation made legal combinations of workmen for better wages, hours and conditions. It was repealed the following year, but the doctrine that these combinations were criminal had been weakened. 6 Geo. IV, ch. 129 (1825). Nevertheless, the English courts continued astute and severe in holding labor combinations to be criminal conspiracies. The latter half of the nineteenth century was well started before definitely corrective legislation was enacted. See Landis, *Cases on Labor Law*, pp. 19-23, n. 10.

<sup>6</sup> Witte, *Early American Labor Cases*, 35 Yale L. J. 825 (1926). Landis, *op. cit.* note 5, disagrees with Mr. Witte and asserts that combinations for better wages and hours were criminal in the early American common law.

<sup>7</sup> 4 Metc. 111 (Mass. 1842).

<sup>8</sup> Jaffin, *Theorems in Anglo-American Labor Law*, 31 Columbia L. Rev. 1104 (1931). See Nelles, *A Strike and Its Legal Consequences*, 40 Yale L. J. 507 (1931), for an excellent discussion of the origin and development of the labor injunction.

lawful. In a law court damages for civil conspiracy could not be recovered unless an overt act was done to the injury of plaintiff.<sup>9</sup> But in equity a showing of imminence of irreparable injury for which the remedy in law was inadequate was sufficient to obtain injunctive relief.

Its efficacy once established, the labor injunction grew in popularity as a means of relief in labor disputes. It was available to private parties and did not await the discretion of prosecuting attorneys. It was speedy, effective and flexible in comparison with formal criminal process. Best of all, it prevented injury whereas indictments were prosecuted only after the harm was done.

Presently in the eyes of labor evils appeared in the practice of issuing injunctions. In scope they had a tendency to embrace activities which were peaceful and unobjectionable as well as activities of fraud and intimidation. Further, procedural safeguards became lax, and injunctions issued on affidavits and *ex parte* proofs. Feeling against the labor injunctions which was easily secured and blanket in terms culminated in sections 6 and 20 of the Clayton Act.<sup>10</sup> The design of these sections was to tighten up procedure and to exempt certain

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<sup>9</sup> Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922).

<sup>10</sup> 15 U. S. C. A., Sec. 12-27, 44; 29 U. S. C. A., 52; 38 Stat. L. 730 (1914). The former section declares that "the labor of a human being is not a commodity or article of commerce" and confirms the right of self-organization. Section 20 forbids granting an injunction "in any case between . . . employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms and conditions of employment "except upon the fulfillment of minimum procedural requirements. If an injunction is issued, then a second paragraph forbids that it "prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . or from peaceably assembling in a lawful manner, and for lawful purposes or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

persons and activities when a labor injunction was prayed for. Several states passed legislation following section 20 of the Clayton Act.<sup>11</sup>

Sections 6 and 20 of the Clayton Act (and the state laws following them) were interpreted and applied in ways disappointing to labor. For reasons which will be explained in a subsequent space, activities and persons exempt from equitable process were severely limited. Injunctions were sued out as easily as ever before. Finally, the insistent and continued demand by labor for a curb on the injunction brought about the passage of the Norris-La Guardia Anti-injunction Law. Fifteen states have subsequently enacted substantially similar anti-injunctions legislation.<sup>12</sup>

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<sup>11</sup> Ariz. Rev. Code (1928), § 4286 *et seq.* (Laws 1913[2nd Spec. Sess.], ch. 41); Conn. Gen. Stats. Rev., 1939 Supp., §§ 1421e-1427e; Ill. Rev. Stat. (1937 Bar Ed.), ch. 48, §§ 2a, 2b (L. 1925, p. 378); Kan. Gen. Stat. Ann. (1935), §§ 60-1104-60-1107 (Laws 1913, ch. 233, §§ 1-4); Mason's Minn. Stat. 1936 Supp.), §§ 4255-4260 (Laws 1917, ch. 493, p. 832, §§ 1-5); N. J. Rev. Stat., 2:29-77 (L. 1926, ch. 207, p. 348); N. D. Comp. Laws (Supp.), §§ 7214a1-7214a3 (Laws 1919, ch. 171, p. 314, §§ 1-3), amended Laws 1935, ch. 247; Ore. Code Ann. (1930), §§ 49-901-49-906 (Laws 1919, ch. 346, p. 614, §§ 1-6); Utah Rev. Stat. (1933), §§ 49-2-1-49-2-8 (Laws 1907, ch. 76, § 1, p. 82; Laws 1917, ch. 68, §§ 1-5, 7, pp. 210-212; Laws 1923, ch. 93, p. 175, § 1; Laws 1933, ch. 15); Wis. Stat. (1937), § 133.07 (Laws 1919, ch. 211).

The Minnesota, North Dakota, Oregon, Utah and Wisconsin statutes have been repealed or superseded by anti-injunction acts and subsequent legislation. In the following discussion the Norris-LaGuardia Act and state laws following it will be termed "anti-injunction laws". The state laws following the Clayton Act in its labor provisions will be termed "little Clayton acts".

<sup>12</sup> Colo. Sess. Laws (1933), ch. 59; Idaho Sess. Laws (1933), ch. 215; Ind. Stat. Ann. (Burns, 1933), §§ 40-501-40-514 (Acts 1933, ch. 12); La. Gen. Stat. (Dart, Supp. 1937), §§ 4379.5-4379.17 (Acts 1934, No. 203); Md. Ann. Code (Flock, Supp. 1935), Art. 100, § 65 *et seq.* (Laws 1935, ch. 574); Mass. G. L. (Ter. Ed.), ch. 149, §§ 20, 20A, 20B, 20C, 24; ch. 214 §§ 9, 9A(1)-(6); ch. 220, §§ 13A, 13B (Acts 1935, ch. 407; Acts 1933, ch. 351); Minn. Stat. (Mason, Supp. 1936), §§ 4260-1-4260-23 (Acts 1933, ch. 416); N. Y. Civ. Prac. Act, § 876a (Laws 1935, ch. 477); N. D. Laws (1935), ch. 247; Ore. Code Ann. (1935), §§ 49-1901-49-1914 (Laws 1933, ch. 355); 43 Pa. Stat. Ann. (Purdon, Supp. 1937), §§ 206a-206r (1937 P. L. 1198, §§ 1-18), superseding and repealing 43 Pa. Stat. Ann. (Purdon, 1931), §§ 202-205 (1931 P. L. 926, §§ 1-3; 1933 P. L. 995, § 1); Utah Laws (1933), ch. 15; Wash. Rev. Stat. Ann. (Rem. 1932), §§ 7612-1 *et seq.* [Laws (Spec. Sess. 1933), ch. 7]; Wis. Stat. (1937), §§ 103.51-103.63 (Laws 1931, ch. 376; as amended by Laws 1935, ch. 541, § 130, ch. 551, § 5); Wyo. Rev. Stat. (1934 Supp.) §§ 63-201-63-207 (Laws 1933, ch. 37, §§ 1-7), partly amended in Wyo. Sess. Laws (1937), ch. 15.

The plan of the modern anti-injunction law is to define broadly the term "labor dispute"<sup>13</sup> and to describe in all-inclusive terms the parties<sup>14</sup> thereto. If a defendant is a "party" to a "labor dispute", then section 4 of the federal law details in a liberal vein all the activities in which he may engage which shall remain free from injunctive process.<sup>15</sup> Even if his activities are excessive and not such as are exempt, the equity court is not to move unless strict requirements of a procedural and substantive nature are met.<sup>16</sup> Noteworthy are the requisites that the public officers must be found unwilling or unable to furnish adequate protection for plaintiff's property<sup>17</sup>

<sup>13</sup> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." § 13(c) of the federal act.

<sup>14</sup> "(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if (1) relief is sought against him or it, and (2) if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent or any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation." §§ 13(a) and (b) of the federal act.

<sup>15</sup> "(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified; . . .

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified. . . ."

<sup>16</sup> Section 7 of the federal act.

<sup>17</sup> Section 7(e).

and that plaintiff has complied with all obligations imposed by law to exert reasonable efforts to settle the dispute by negotiations or through governmental agencies.<sup>18</sup> It is no wonder, then, that an employer who seeks equitable relief in a federal court will attempt to avoid the anti-injunction law by arguing that his difficulty does not involve parties to a labor dispute. If he is successful in his contention, common law principles of equity will determine whether injunction will issue.

This background of the legality of labor warfare suggests the appropriateness of evaluating the effectiveness of modern legislation in giving to labor new privileges. Those new privileges are measured by purposes and means of labor warfare which are now beyond the reach of equity. The question pursued in these pages is: how have the various purposes and means of labor warfare fared under the common law, under §20 of the Clayton Act, and under the anti-injunction laws? The recent labor relations acts will be discussed only incidentally in their bearing upon the establishment of the legality or illegality of a particular purpose of labor warfare.

## II

In some cases where the labor injunction is issued, the opinion is indistinct as to whether the reason is unlawfulness of objective, or unlawfulness of means, or both. This makes for difficulty in determining whether a purpose is unlawful so as to make subject to injunction activities which would be free of restraint if the purpose were legal. However, most of the cases are clear, and fairly accurate conclusions may be drawn.

Higher wages, lower hours and better conditions have been everywhere approved as lawful purposes of labor warfare.<sup>19</sup> In deciding the legality of these purposes, a court encounters a problem of policy. On the one hand, the employer claims a right to manage his business as he chooses and asserts that the dissatisfied employee is free to quit and to move elsewhere. On the other hand, the laborer points to the manifest reality that he is not free or able to take up employment elsewhere in an age

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<sup>18</sup> Section 8.

<sup>19</sup> See text at notes 4, 5 and 6, *supra*. This is true although better wages and hours are sought than are enjoyed under competitors of plaintiff employer. *Saulsbury v. Coopers' International Union* (1912), 147 Ky. 170, 143 S. W. 1018.

in which supply of labor exceeds demand, and he asserts an interest in the employment to which he is tied by economic necessity. From the employees' interest in wages, hours and conditions of work has been derived a privilege to wage labor warfare, within certain bounds, against the employer's managerial prerogatives. This balancing of interests occurs in all common law decisions, and in many under the statutes, with respect to all the purposes of labor warfare. The problem becomes more knotty as the purposes become removed from the immediate objectives of better wages, hours, and conditions.

The objective of the closed shop contract, requiring the employer to hire union men only, has relation to the welfare of employees in the sense that it strengthens the organization which is striving for better hours, wages, and conditions. The older rule at common law declared this purpose remotely related to the welfare of employees and tending to monopoly; consequently, labor warfare for it was enjoined as unlawful.<sup>20</sup> But a clear majority of decisions of the modern day have stamped it a lawful purpose.<sup>21</sup>

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<sup>20</sup> Keith Theater v. Vachon (1936), 134 Me. 392, 187 A. 692; Folsom Engraving Co. v. McNeil (1920), 235 Mass. 269, 126 N. E. 479; Gevas v. Greek Restaurant Workers' Club (1926), 99 N. J. Eq. 770, 134 A. 309; Bausbach v. Reiff (1914), 244 Pa. 559, 91 A. 224; Cooks', Waiters', and Waitresses' Local Union v. Papageorge (Tex. Civ. App. 1921), 230 S. W. 1086. See Rotwein, Labor Law, § 30.

<sup>21</sup> Shaper v. Registered Pharmacists Union Local 1172 (Calif. 1940), 106 P. (2d) 403; Cohn & R. Elec. Co. v. Bricklayers, etc., Local U. No. 1 (1917), 92 Conn. 161, 101 Atl. 659; Kemp v. Division No. 241 (1912), 255 Ill. 213, 99 N. E. 389; Scofes v. Helmar (1933), 205 Ind. 596, 187 N. E. 612; Grant Construction Co. v. St. Paul Bldg. Trades Council (1917), 136 Minn. 167, 161 N. W. 520, 1055; Exchange Bakery & Restaurant, Inc. v. Rifkin (1927), 245 N. Y. 260, 157 N. E. 130; San Angelo v. Amalgamated Meat Cutters (Tex. Civ. App. 1940), 139 S. W. (2d) 843. A large number of decisions may be found in which the closed shop is the objective, the prayer for injunctive relief is based on grounds other than the illegality of the closed shop as a purpose, and injunction is denied. Meier v. Speer (1910), 96 Ark. 618, 132 S. W. 983; Clark Lunch Co. v. Cleveland Waiters' Local Union (1926), 220 Ohio App. 265, 154 N. E. 362; Kimbel v. Lumber & Saw Mill Workers Union No. 2575 (Wash. 1937), 65 Pac. (2d) 1066. The implication in these cases is that the closed shop is an approved purpose. Still other cases grant injunction on some ground, but seem to assume throughout that the closed shop is a lawful purpose. Local Union No. 313, Hotel & Restaurant Employees v. Stathakis (1918), 135 Ark. 86, 205 S. W. 450; Music Hall Theatre v. Moving Picture M. O. Local No. 165 (1933), 249 Ky. 639, 61 S. W. (2d) 283; Bomes v. Providence Local No. 223 (1931), 51 R. I. 500, 155 A. 581; See Sayre, *Labor and the Courts* (1930), 39 Y. L. J. 682, 696; Rotwein, Labor Law, § 30.



Under section 20 of the Clayton Act and under the derivative Illinois enactment, the closed shop has been directly or by implication approved as a lawful purpose.<sup>22</sup> In New Jersey, however, the closed shop objective is of doubtful legality. Some decisions may be cited for the proposition that the purpose is always illegal,<sup>23</sup> while others seem to indicate that it is illegal only where sought throughout an industry and not as against a single employer.<sup>24</sup> The Wisconsin court decided that the closed shop was a purpose outside the scope of the little Clayton Act; but injunction was denied because the purpose was deemed legal at common law.<sup>25</sup>

In all the states having anti-injunction laws, with the exceptions of Indiana and Massachusetts,<sup>26</sup> the closed shop is a

<sup>22</sup> Duplex Printing Press Co. v. Deering (1921), 254 U. S. 443, 41 S. Ct. 172; Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn. (1927), 274 U. S. 37, 47 S. Ct. 522; Aeolian Company v. Fisher, (Dist. Ct., 1929) 35 Fed. (2d) 34, reversed on other grounds in (C. C. A., 2nd, 1930) 40 F. (2d) 189; Fenske Bros. v. Upholsterers' International Union (1934), 358 Ill. 239, 193 N. E. 112; Lietzman v. Radio Broadcasting Station W.C.F.L. (1935), 282 Ill. App. 203.

In Oregon labor defendants avoided putting in issue the applicability of the little Clayton Act to Disputes concerning the closed shop. See Moreland Theatres v. M. P. Union, 140 Or. 35, 122 P (2d) 333 (1932); Blumauer v. Portland M. P. M. O. P. Union (1933) 141 Or. 399, 17 P. (2d) 1115. The legality of the purpose was dubious, especially in light of the *Heitkemper* case, cited note 45, *infra*.

<sup>23</sup> Gevas v. Greek Restaurant Workers Club (1926), 99 N. J. Eq. 770, 134 A. 309; International Ticket Co. v. Wendrich (1937), 122 N. J. Eq. 222, 193 A. 808, *aff'd* 123 N. J. Eq. 172, 196 A. 474 (on appeal facts said to justify injunction); Elkind & Sons, Inc. v. Retail Clerks' Assn. (1933), 114 N. J. Eq. 586, 169 A. 494; Dolan Dining Co. v. Cooks' and Assistants' Union (N. J. Ch. 1938), 4 A. (2d) 5.

<sup>24</sup> The Four Plating Co., Inc. v. William Mako, (N. J. Ch. 1937), 122 N. J. 298; Lora Lee Dress Co. v. International L. G. W. U. Local No. 85 (N. J. Ch. 1940), 14 A. (2d) 46; Heyl v. Culinary Alliance, Local 611 (N. J. Ch. 1938), 9 A. (2d) 331; McPrehson Hotel Co. v. Smith (N. J. Ch. 1940), 12 A (2d) 136; Christiansen v. Local 680 of M. D. and D. Employees (N. J. Ch. 1940), 10 A. (2d) 168.

The New Jersey Court of Errors and Appeals has established no definite rule. The closed shop seems to have been assumed a legal purpose in *Evening-Times Printing & Publishing Co. v. American Newspaper Guild* (1938), 124 N. J. Eq. 71, 199 A. 598. One employer and not an industry was attempted to be unionized. And see *Bayonne Textile Corp. v. American, etc., Worker* (1934), 116 N. J. Eq. 146, 172 A. 551, reversing (1933), 114 N. J. Eq. 307, 168 A. 799; 9 I. J. A. Bull. 59 (1940).

<sup>25</sup> A. J. Monday Company v. Automobile, A. & V. Worker (1920), 171 Wis. 532, 177 N. W. 867.

<sup>26</sup> Roth v. Local Union No. 14602 Retail Clerks Union (Ind. 1939), 24 N. E. (2d) 280; Massachusetts cases cited note 67, *infra*, make the closed shop of doubtful legality.

purpose for which strikes and picketing may be called free from equitable restraint.<sup>27</sup> Both under the anti-injunction law and under section 20 of the Clayton Act a closed shop controversy seems to be a labor dispute concerning terms or conditions of employment, and the restrictions on the issuance of injunction should apply. Decisions holding §20 of the Clayton Act or the anti-injunction law inapplicable to controversies over the closed shop issue do so by reasoning that an unlawful purpose renders a labor controversy not a "labor dispute". This same reasoning has been utilized as to a variety of purposes disapproved by the courts.<sup>28</sup> Thus, the common law dichotomy of lawful and unlawful purposes of labor warfare has cut across the anti-injunction laws and section 20 of the Clayton Act (and derivative state laws) even though they make no mention of motives or objects of labor warfare.<sup>29</sup> Criticism may be made that the very purpose of this legislation was to prevent courts from applying their doctrines of unlawful purposes to labor disputes. However this may be, it must be said that the decisions which hold purposes unlawful and controversies caused by them not "labor disputes" under the anti-injunction laws are comparatively few and confined to a narrow range of cases.

Closely related to the purposes of better wages, hours and conditions and therefore lawful are limitations on the number of apprentices in a shop and regulations as to piecework,<sup>30</sup> payment of wages in a particular way,<sup>31</sup> and the furnishing of

<sup>27</sup> *Edward Lauf v. E. G. Shinner & Co.* (1938), 303 U. S. 323, 58 S. Ct. 578; *Denver Local Union No. 13 v. Perry Truck Lines* (Colo. 1940), 101 P. (2d) 436; *Goldfinger v. Feintuch* (N. Y. Ct. of Appeals, 1937) 11 N. E. (2d) 910; all the cases cited notes 65 and 66, *infra*, permitting an outside union to picket for the closed shop may be cited as authority for this proposition.

<sup>28</sup> See cases cited notes 67, 71, 72, 73, and 86, *infra*.

<sup>29</sup> See *Eastwood & Neally Corp. v. International Ass'n, etc.*, (N. J. Ch. 1938), 1 A. (2d) 477 at 479 for a statement that the little Clayton act has nothing to do with purposes, and if they are illegal it is inapplicable. Cf. *Wilson & Co. v. Birl* (C. C. A., 3rd, 1939), 105 F. (2d) 948, 951, aff'g 27 F. Supp. 915: "Section 4 [of the anti-injunction law enumerates] certain acts not subject to injunctive relief. The test is objective; not the purpose or intent of the acts sought to be restrained, and not even their legality, but whether they come within § 4. Whether or not the strike in this case is illegal, because of its purpose . . . is therefore beside the point."

<sup>30</sup> See annotation in 71 L. ed. 248.

<sup>31</sup> *L. D. Willcutt & Son Co. v. Driscoll* (1908), 200 Mass. 110, 85 N. E. 897.

materials on a job.<sup>32</sup> A union rule that a contractor coming from one locality to another shall meet the union standards of wages and hours of the former if higher than the latter is sustained by authority.<sup>33</sup> But warfare waged to compel an employer to employ a minimum number of men seems to have been disapproved and enjoined by most of the common law decisions.<sup>34</sup> The interest of employees in retaining their employment has moved them to strike and picket to compel division of available work instead of lay-offs,<sup>35</sup> to compel continuance of an unprofitable plant<sup>36</sup> and to prevent use of labor-saving devices<sup>37</sup>—all of which purposes infringe upon the employer's managerial privilege and have been held unlawful. Even more drastic an infringement is the demand that an

<sup>32</sup> *W. F. Const. Corp. v. Hanson* (1937), 250 App. Div. 727, 293 N. Y. S. 170 (decision under anti-injunction law).

<sup>33</sup> *H. J. Lipman & Sons v. Brotherhood of Painters* (1939), 63 Ohio App. 157, 25 N. E. (2d) 853 (decision under common law). Under Clayton Act or derivative: *Barker Painting Co. v. Brotherhood of Painters* (1927), 57 D. C. App. 322, 23 F. (2d) 743; *Barker Painting Co. v. Brotherhood of Painters* (C. C. A., 3rd, 1926), 15 F. (2d) 16; *N. J. Painting Co. v. Local No. 26* (1924), 96 N. J. Eq. 632, 126 A. 399. Under anti-injunction law: *Rambusch Dec. Co. v. Brotherhood, etc., of America* (C. C. A., 2nd, 1939), 105 F. (2d) 134.

<sup>34</sup> *Strand Theater v. Gillen* (1918), 229 Mass. 413, 118 N. E. 671; *Folsom Engraving Co. v. McNeil* (1920), 235 Mass. 269, 126 N. E. 479; *Edelman, etc. v. Retail Grocery D. C. U.* (Sup. Ct. 1922), 119 Misc. 618, 198 N. Y. S. 17. Accord under little Clayton Act: *Campbell v. Motion Picture M. Op. Union* (1922), 151 Minn. 220, 186 N. W. 783; *Moreland Theatres v. M. P. Union* (1932), 140 Or. 35, 122 P. (2d) 333. Under both Clayton and anti-injunction laws: *State ex rel. Weiner* (C. C. A., 3rd, 1936), 84 F. (2d) 27. *Contra* under common law: *Scott-Stafford Open House Co. v. Minneapolis Musicians' Assn.* (1912), 118 Minn. 410, 136 N. W. 1092; *Empire Theater v. Cloke* (1917), 53 Mont. 183, 163 Pac. 107.

In general where under an anti-injunction act or under § 20 of the Clayton act (or derivative state law) a purpose is held illegal, by the same token it is unlawful under the common law.

<sup>35</sup> Injunction granted in *Jaekel v. Kaufman* (Sup. Ct. 1920), 187 N. Y. S. 889; *Benito Rovira Co. v. Yampolsky* (Sup. Ct. 1921), 187 N. Y. S. 894.

<sup>36</sup> Purpose unlawful: *Rutan Co. v. Local Union* (1925), 97 N. J. Eq. 77, 128 A. 622; *Welinsky v. Hillman* (1920), 185 N. Y. S. 257. These are examples of cases wherein the purpose is so illegal as to call for injunction against picketing but not against strikes. See text at note 90, *infra*.

<sup>37</sup> Purpose unlawfully at common law; *Hopkins v. Oxley Stove Co.* (1897), 28 C. C. A. 99, 83 F. 912. Injunction denied under little Clayton Act: *Bayer v. Brotherhood of Painters, Decorators and Paperhangers of America* (N. J. Ct. of Errors and Appeals, 1931), 108 N. J. Eq. 257, 154 A. 759.

employer quit working and hire union men.<sup>38</sup> The establishment of a price schedule might seem properly to fall exclusively within the employer's discretion,<sup>39</sup> but it is not difficult to see a relationship between prices and wages, hours, and conditions of labor sufficient to justify labor warfare. All these purposes seem to call into existence a "labor dispute" involving terms and conditions of employment within the anti-injunction law, and it is doubtful that injunction would issue except after compliance with its provisions. The same might be said concerning §20 of the Clayton Act and the state derivatives. However, the cases<sup>40</sup> indicate that some of these purposes are deemed unlawful and call into existence controversies which are not "labor disputes" and to which the Clayton Acts are inapplicable.

Strike and picketing carried on to compel reinstatement of an employee discharged because of his membership in a union is generally considered lawful<sup>41</sup>. Some common law authority to the contrary may be found based on the employer's absolute right to discharge for any or no reason<sup>42</sup>. Discrimination against union men constitutes a serious discouragement of the exercise of the privilege of combining to secure better wages,

<sup>38</sup> Injunction granted: *Parker Paint and Wall Paper Co. v. Local Union No. 813* (1921), 87 W. Va. 631, 105 S. E. 911 (common law decision); *Roraback v. Motion Picture Mach. Operators Union* (1918), 140 Minn. 481, 168 N. W. 766; *Campbell v. Motion Picture Mach. Operators Union* (1922), 151 Minn. 220, 186 N. W. 781 (under little Clayton act).

<sup>39</sup> Injunction denied under anti-injunction law: *Lichterman v. Laundry and Dry Cleaning Drivers Union Local No. 131* (Minn. 1938), 232 N. W. 639, rehearing denied, 233 N. W. 752 (1939). *Contra* under common law: *Ellis v. Journeyman Barber's I. U. of America* (1922), 114 Iowa 1179, 191 N. W. 111; *Standard Engraving Co. v. Volz* (1922), 200 App. Div. 753, 193 N. Y. S. 831.

<sup>40</sup> E. g., cases cited notes 34 and 38, *supra*.

<sup>41</sup> Under anti-injunction law: *Boise Street Car Co. v. Van Avery* (Ida. 1940), 103 P. (2d) 1107; *Starr v. Laundry Union* (1937), 155 Or. 634, 63 P. (2d) 1104; *City of Yakima v. Gorham* (Wash. 1939), 94 P. (2d) 180. Under little Clayton Act: *Newark Ladder U. B. S. Co. v. Furniture Workers U.* (N. J. Ch. 1939), 4 A(2d) 49. Under common law: *E. M. Loew's Enterprises v. International A. T. S. E.* (Conn. 1939), 6 A(2d) 321; *Walter A. Wood Mowing & R. Mach. Co. v. Toohey* (1921), 114 Misc. 185, 186 N. Y. S. 95. In both the *Van Avery* and *Loew's Enterprises* cases, *supra*, the employer denied he had exercised his power to discharge in a discriminatory manner.

<sup>42</sup> *Mechanics Foundry & Machinery Co. v. Lynch* (1920), 236 Mass. 504, 128 N. E. 877; *Hotel & Railroad News Co. v. Lynch* (1922), 243 Mass. 317, 137 N. E. 534 (not clear whether men discharged because of union membership).

hours and conditions. Hence, labor warfare against discrimination would seem to have sufficient legal justification. In jurisdictions having labor relations acts this conclusion would be certain because discrimination is generally an unfair labor practice. Under the anti-injunction laws a labor dispute involving terms or conditions of employment would be provoked, and the lawful modes of labor warfare would be permitted.<sup>43</sup> All this reasoning would seem equally applicable to labor warfare stirred up by an employer in committing other unfair labor practices as defined by the labor relations acts. These other unfair labor practices include domination of a company union and interference with organizational activity. If neither the closed shop nor abatement of discrimination is an objective and a union strikes and pickets to compel hiring of a particular person, injunction has issued<sup>44</sup>. It was thought the demand was too drastic an imposition on the employer's prerogatives and remotely related to the employees' welfare.

Collective bargaining has long been a bone of contention between employer and union. There is some authority that an employer has an absolute right not to bargain collectively and that efforts to cause a relinquishment of it will be enjoined.<sup>45</sup> But the trend of modern authority is to hold collective bargaining a lawful end of labor warfare.<sup>46</sup> The decisions which sustain striking and picketing for the closed shop seem impliedly to acknowledge the legality of the purpose of collective bargaining.

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<sup>43</sup> All states having labor relations acts (except Michigan) have enacted anti-injunction laws; notes 3 and 12, *supra*. In both types of laws "labor dispute" is defined similarly.

<sup>44</sup> *Yankee Network v. Gibbs* (Mass. 1936), 3 N. E. (2d) 223 (anti-injunction act not mentioned); *Grassi Contracting Co. v. Bennett* (1916), 174 App. Div. 244, 160 N. Y. S. 279 (common law decision).

<sup>45</sup> Under common law: *United Shoe Machinery Corp. v. Fitzgerald* (1920), 237 Mass. 537, 130 N. E. 86; *Folsom Engraving Co. v. McNeil* (1920), 235 Mass. 269, 126 N. E. 479; *Hotel & Railroad News Co. v. Leventhal* (1922), 243 Mass. 317, 137 N. E. 534. In *Moore Drop Forging Co. v. McCarthy* (1923), 243 Mass. 554, 137 N. E. 919, collective bargaining was held an illegal object where plaintiff employer wanted to negotiate individual "yellow dog" contracts (i. e., contracts wherein the employee agrees to forgo all union affiliation while he remains an employee). Under § 20 of Clayton Act; *Heitkemper v. Central Labor Council* (1921), 99 Or. 1, 192 Pac. 765.

<sup>46</sup> Common law decisions: *McKay v. Retail Automobile Salesmen's Local No. 1067* (Calif. Dist. Ct. of App. 1939), 89 P. (2d) 426; *E. M. Loew's Enterprises v. International A. T. S. E.* (Conn. 1939), 6 A. (2d) 321; *Cornellie r. v. Haverhill Shoe Mfrs. Assoc.* (1915), 221 Mass. 554, 109 N. E. 645; *Weissman v. Jureit* (Fla. 1938), 181 So. 898.

Part and parcel of any dispute in which a union is striving for particular terms, is the end of collective bargaining. Certainly under the anti-injunction laws a labor dispute concerning the association or representation of persons in negotiating terms or conditions of employment is created by the demand for collective bargaining.<sup>47</sup> In those jurisdictions having labor relations acts creating the right to bargain collectively, the legality of the purpose as to the representative of the majority in an appropriate unit is beyond question.

After collective bargaining has resulted in a contract, there remains in its breach the possibility of industrial conflict. To compel an employer's adherence to the terms of a contract is a lawful purpose of labor warfare.<sup>48</sup> The objection that the union should resort to court procedures to enforce the contract has not prevailed. If a union has a privilege to wage labor warfare for better hours, wages, and conditions, it would seem to have a like privilege to maintain a contract. On the other hand, a union may breach its contract in one of two ways. It may be demanding terms or concessions to which it is not entitled under the contract; or it may be waging labor warfare prematurely and without resort to arbitration which is by the agreement to be the mode of settlement of controversy. In either case injunction issues at common law.<sup>49</sup> Of course equity will require a showing

<sup>47</sup> Wash. Shoe Workers' Union v. United Shoe Workers' Union (Dist. Ct., D. of C., 1937), 1 Lab. Rel. Rep. 469; S. S. Kresge Co. v. Kitty Amsler (Dist. Ct. 1937), C. C. H. Labor Law Service, ¶ 16393; Gambarelli v. Oneto (N. Y. Sup. Ct. 1937), 1 Lab. Rel. Rep. 490; Starr v. Laundry Union, note 41, *supra*. All the decisions discussed *infra*, at notes 78 and 79, which apply the anti-injunction law to disputes between rival unions, by implication sustain this statement. A dispute between unions is a clash in which each demands collective bargaining privileges.

<sup>48</sup> Under common law: cases cited in 95 A. L. R. 10, 44, 45; Smith v. Bowen (1919), 232 Mass. 106, 121 N. E. 814; Rhodes Bros. Co. v. Musicians Protective Union Local (1915), 37 R. I. 281, 92 A. 641. Under a little Clayton act: Greenfield v. Central Labor Council (1922), 104 Or. 236, 192 Pac. 770, 207 Pac. 168; Atlanta, B. & A. Ry. Co. (Dist. Ct. 1921), 271 F. 743. Under anti-injunction act: Marvel Baking Co. v. Teamsters' Union Local No. 524 (Wash. 1940), 105 P. (2d) 46. Cf. Jensen v. St. Paul M. P. O. Local Union No. 356 (1935), 194 Minn. 53, 259 N. W. 811 (no labor dispute where contract breached had expired; unions advised to sue at law; injunction granted).

<sup>49</sup> Cases cited in 95 A. L. R. 10; Gilchrist Co. v. Metal Polishers, Buffers and Platers Local Union (N. J. Ch. 1919), 113 A. 320. Note should be taken that where a union strikes and pickets for terms

that irreparable injury to business may eventuate for which the remedy at law on the contract is inadequate. In all fairness it would seem that an employer who may be compelled by labor warfare to bargain collectively is entitled to the stability of the contract into which he enters.

Notwithstanding the considerations of policy in favor of the employer, literal reading of section 20 of the Clayton Act and of the anti-injunction laws seems to deprive him of equitable remedy. A labor dispute concerning terms and conditions of employment exists; and even after procedural and substantive requirements are met, no injunction may issue against striking and peaceful picketing.<sup>50</sup> The New York anti-injunction law deprives courts of jurisdiction to issue injunctions in labor disputes except upon findings, among others, that "a breach of . . . contract not contrary to public policy has been threatened or committed" and that no item of relief prohibits striking or peaceful picketing.<sup>51</sup> Nevertheless, the New York Court of Appeals has construed the law to permit of injunctions against striking and picketing in violation of a collective bargaining contract even though a "labor dispute" exists.<sup>52</sup> Perhaps other courts will follow the lead of the New York court by construction of the statute or by declaring that no "labor dispute" exists where labor warfare is waged contrary to agreement. Argument may well be made that the anti-injunction law was drawn up against evils which did not include the situation in which an employer seeks enforcement of a collective bargaining contract. In recent years some states have amended their labor

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better than those settled by contract, the *purpose* seems unlawful. Where the contract does not settle the terms struck for but it is agreed that labor warfare is not to be used before exhaustion of other peaceful procedures, the *means* seem illegal.

<sup>50</sup> So held in *Wilson & Co. v. Birl* (Dist. Ct. 1939), 27 F. Supp. 915, aff'd (C. C. A., 3rd, 1939) 105 F. (2d) 943; *Colorado-Wyoming Express v. Denver Local Union* (Dist. Ct. 1940), 35 F. Supp. 155. *Contra*: *Yellow Cab. O. Co. v. Taxicab Drivers Local U. No. 889* (Dist. Ct. 1940), 35 F. Supp. 403 (but other reasons were sufficient for absence of "labor dispute"). No case authority has been found under the Claxton act or derivative state laws.

<sup>51</sup> §§ 1 (a) and (f).

<sup>52</sup> *The Nevins v. Kasmach* (1937), 18 N. E. (2d) 294. Accord: *Greater City Master Plumbers' Association v. Kahme* (Sup. Ct. 1937), 6 N. Y. S. (2d) 589; *F. Everett, Inc. v. Penna* (Sup. Ct. 1938), 6 N. Y. S. (2d) 630.

relations acts and anti-injunction laws to make breaches of contract by a union an unfair labor practice and subject to injunction.<sup>53</sup>

To this point it has been assumed that as a part of labor warfare waged for a given purpose some employees are on strike. Where no employees are on strike, the familiar picketing without strike case arises. The union and its members are outsiders, and it is necessary to find an interest in them sufficient to justify their picketing. In most cases the objective is a closed shop, but sometimes better wages and hours and other purposes are in view. Most courts by their holdings have said that a union has no valid interest in an employment relation to which no union member is a party. Accordingly, the common law rule by a definite preponderance of authority is that picketing without strike will be enjoined.<sup>54</sup> This same rule has generally prevailed in jurisdictions which have enacted §20 of the Clayton Act because the courts have construed that legislation not to extend its exemptions to outside unions.<sup>55</sup> The rule may be made of

<sup>53</sup> Minn. Laws 1939, ch. 440, §§ 11, 14; 43 Purdon's Penn. Stat. Ann., 1939 Cum. Pocket Part, § 206 d; Wis. Stat. (1939), § 111.06 (2) (c).

<sup>54</sup> Retail Clerks Union Local 779 v. Lerner Shops, (Fla. 1939), 193 So. 529; Hotel, Restaurant, etc., Local Union No. 181 v. Miller (1938), 272 Ky. 466, 114 S. W. (2d) 501; Keith Theatre v. Vachon (1936), 134 Me. 392, 187 A. 692; Harvey v. Chapman (1917), 226 Mass. 191, 115 N. E. 304; Lyle v. Local No. 452, Amalgamated Meat Cutters, etc. (Tenn. 1939), 124 S. W. (2d) 701; Webb v. Cooks', Waiters and Waitresses' Union (Tex. Civ. App. 1918) 205 S. W. 465; Safeway Stores v. Retail Clerks' Union (Wash. 1935), 184 Wash. 322, 51 Pac. (2d) 372. These are cases in which the closed shop was the objective. Other purposes were picketed for in Beck v. Railway Teamsters' Protective Union (1898), 118 Mich. 497, 77 N. W. 13 (wages and hours); Crouch v. Central Labor Council (1930), 134 Or. 612, 293 Pac. 729 (wages and hours); Fornili v. Auto Mechanics' Union Local No. 297 (Wash. 1939), 93 P. (2d) 422 (breach of collective bargaining contract which had expired).

<sup>55</sup> Meadowmoor Dairies v. Milk Wagon Drivers' Union, etc. (Ill. Supreme Ct. 1939), 21 N. E. (2d) 308 (to change plaintiff's method of selling milk through independent vendors to one in which employees paid union wages sell); Swing v. American Federation of Labor (1939), 372 Ill. 91, 22 N. E. (2d) 857; Hendrickson Motor Truck Co. v. International Ass'n of Machinists (Ill. App. Ct. 1939), 22 N. E. (2d) 969 (for closed shop and to oust rival union); Feller v. Local 144, Int'l Ladies Garments Workers Union (Ct. of Errors and Appeals, 1937), 121 N. J. Eq. 452, 191 A. 111 (1936); Gevas v. Greek Restaurant Workers Club (1926), 99 N. J. Eq. 770, 134 A. 309; Kitty Kelly Shoe Corp. v. United Retail Employees (N. J. Ch. 1939) 5 A. (2d) 682 (outside union pickets to aid striking union); John R. Thompson Co. v. Delicatessen and C. W. U. (N. J. Ch. 1939), 8 A. (2d) 130 (collective bargaining and better terms); Millers, Inc. v. Journeymen Tailors



even broader scope. It may safely be said that the secondary boycott and other forms of labor warfare (excepting simple publication of the facts of dispute) without strike will be restrained at common law and under the Clayton acts.<sup>56</sup>

A minority of courts have been won over by the argument that an outside union has sufficient interest to wage warfare for the closed shop and for better wages and hours in order to strengthen the union and to prevent deterioration of labor standards generally.<sup>57</sup> Nonunion employers might otherwise be able to sell their services and goods at price levels which cannot be met by union employers.

Liberal construed, § 20 of the Clayton Act and the derivative state enactments might have been held to extend their exemptions to outside unions picketing for the closed shop or better conditions. However, few decisions took this view.<sup>58</sup>

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Union (Ct. of Errors and Appeals, 1940), 15 A. (2d) 824 (to cause hiring of union man or to compel collective bargaining contract); Crouch v. Central Labor Council (1930), 134 Or. 612, 293 Pac. 729 (better wages and hours); Kansas and Illinois cases cited note 61, *infra*. Purposes other than the closed shop are enclosed in parentheses.

A picketing with strike case cannot be converted into a picketing without strike case by a fake sale of the part of the business in which the strike has occurred. Ritholz v. Andert (1939), 303 Ill. App. 61, 24 N. E. (2d) 573.

<sup>56</sup> Under common law: Texas, etc., Operators v. Galveston, etc., Operators (Tex. Civ. App. 1939), 132 S. W. (2d) 299; United Union Brewing Co. v. Beck (Wash. 1939), 93 P. (2d) 772. Under common law, the little Clayton act not extending any exemption: Meadowmoor Dairies v. Milk Wagon Drivers' Union, etc., note 55, *supra*; Maywood Farms Co. v. Milk Wagon Drivers' Union (Ill. App. Ct. (1939), 22 N. E. (2d) 962 (secondary picketing); Van Buskirk v. Sign Painters Local No. 1231 (N. J. Ct. of Errors and Appeals, 1940), 14 A. (2d) 45; Mitnick, etc. v. Furniture Workers Union; Local No. 66 (N. J. Ch. 1938), 200 A. 553. In these cases where secondary boycotts and secondary picketing are concerned, an independent ground for injunction in the illegality of *means* may exist.

<sup>57</sup> C. S. Smith Metropolitan Co. v. Lyons (Calif. 1940), 106 P. (2d) 414; McKay v. Retail Automobile Salesmen's L. U. No. 1067 (Calif. 1940), 106 P. (2d) 373; Lund v. Auto Mechanics' Union No. 1414 (Calif. 1940), 106 P. (2d) 408; Purcell v. Journeymen Barbers Union (Kansas City Ct. of App. 1939), 133 S. W. (2d) 662 (better wages and hours; dicta that unfair labor practices were sufficient legal cause); Nann v. Raimist (1931), 255 N. Y. 307, 174 N. E. 690; Clark Lunch Co. v. Cleveland Waiters' Local Union (1926), 22 Ohio App. 265, 154 N. E. 362; cases cited note 76, *infra*.

<sup>58</sup> Schuster v. International Assn. of Machinists (Ill. App. Ct. 1938), 293 Ill. App. 177, 12 N. E. (2d) 50; Siegell v. Newark National Negro Congress (N. J. Ch. 1938), 2 Lab. Rel. Rep. 290. Both these decisions are of doubtful authority for the jurisdiction from which they come. See note 55, *supra*.

Many decisions probably held or assumed that the exemptions did extend to employees and their union.<sup>50</sup> It remained for the federal courts to apply a construction most disappointing of all for labor.

In *American Steel Foundries v. Tri-City Central Trades Council*<sup>50</sup> dull times had closed plaintiff's plant. On reopening plaintiff rehired 300 out of 1600 men at reduced wage levels. Two men struck, and large scale picketing took place. It was held that § 20 of the Clayton Act could be invoked by the two strikers only.<sup>51</sup> As to their union and other pickets, the common law applied. A sweeping injunction issued, and while the common law was said to permit persuasion by the union members because of their interest in their former employment, picketing was limited to one person at each gateway of the plant. A logical extension of this case is the decision of *Duplex Printing Co. v. Deering*<sup>52</sup> which held that because defendant union could not claim the exemption of the Clayton Act, it could be enjoined under the anti-trust laws from inducing employers in various states by secondary boycott not to use plaintiff's product. The effect of these decisions was that a defendant union was not a person who could claim exemption under the Clayton Act with respect to any type of labor warfare which for some reason was deemed unlawful. In sum, § 20 of the Clayton Act and the derivative state laws were ineffectual in gaining for an outside union the privilege of waging labor warfare for any purpose; further, under the federal interpretation the legislation was nugatory in its effect upon the common law so far as the unions of striking employees were concerned.

<sup>50</sup> *Bayonne Textile Corp. v. American, Inc., Silk Workers* (Ct. of Errors and Appeals, 1934), 116 N. J. Eq. 146, 172 A. 551. See cases cited note 102 *infra*.

<sup>51</sup> (1921), 257 U. S. 184, 42 S. Ct. 72. The case arose on diversity of citizenship.

<sup>52</sup> Accord: *Bull v. International Alliance* (1925), 119 Kan. 713, 241 Pac. 459; see *Giltner v. Becker* (1931), 133 Kan. 170, 298 Pac. 780 and *State, ex rel. v. Howat* (1921), 109 Kan. 376, 198 Pac. 686. Two Illinois cases adopt in full the reasoning of the *Tri-City* case: *Ossey v. Retail Clerks' Union* (1929), 326 Ill. 405, 158 N. E. 162; *Swing v. American Federation of Labor* (Ill. App. Ct. 1938), 18 N. E. (2d) 258.

<sup>53</sup> (1921) 254 U. S. 443, 41 S. Ct. 172. Accord: *United States Gypsum Co. v. Heslop*, 39 Fed. (2d) 228 (Dist. Ct. N. D. Iowa, 1930); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association* (1927), 274 U. S. 37, 47 S. Ct. 522; *Aeolian Company v. Fischer* (C. C. A., 2nd, 1930) 40 F. (2d) 189.

Of aid to the employer in calling into play the common law rule that outside unions will be enjoined from labor warfare is the doctrine that a picketing and strike case may be converted into a picketing without strike case by the passage of time. The development in some courts has been that after a strike has run for a substantial time, strikers have been replaced and the employer's business is being carried on as usual, the case becomes one of picketing without strike, and the union will be enjoined as an "outsider".<sup>63</sup> The decisions betray varying degrees of liberality on the part of the courts towards labor in applying the doctrine to the facts before them.

The language of the Norris-LaGuardia Act (and state acts) manifests a clear intention to extend the exemptions of the statute to outside unions as well as unions representing some employees. Sections 13 (a) and (b) define a case involving or growing out of a labor dispute in terms of parties to the action; and the parties are so broadly described that a literal interpretation would cause application of the law to a negligence case or a boundary dispute between two factory hands who happen to be employed in the same industry.<sup>64</sup> However, all the decisions seem to limit the scope of these sections by reading into them the definition of "labor dispute" set forth in § 13(e). The latter section defines "labor dispute" to include controversies concerning terms of employment, or the association or representation of employees in collective bargaining; and it concludes with the expression, "regardless of whether or not disputants stand in the proximate relation of employer and employee." This clause has been effective generally in causing peaceful picketing without strike for the closed shop or other purposes relating to terms of employment to be free from equit-

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<sup>63</sup>E. M. Loew's Enterprises v. International A. T. S. E. (Conn. 1939), 6 A. (2d) 321 (careful opinion in which doctrine found inapplicable); Moore Drop Forging Co. v. McCarthy (1923), 243 Mass. 554, 137 N. E. 919; Hertz v. Gibbs (Mass. 1936), 3 N. E. (2d) 831; G. Loewus & Co. v. Wine, Liquor and D. W. Union (N. J. Ch. 1939), 9 A. (2d) 134; Newark Baseball Club, Inc. v. Theatrical Managers (N. J. Ch. 1940), 10 A. (2d) 274.

<sup>64</sup>See note 14, *supra*. See Donnelly Garment Co. v. International L. G. W. Union (Dist. Ct. 1937), 20 F. Supp. 767 and dissent of Judge Otis in *id.* (1937), 21 F. Supp. 807, for opinions in which this possibility of literal construction is discussed. Various types of controversies are examined and found to fall within §§ 13(a) and (b) although they are not in any actual sense labor disputes.

able restraint.<sup>65</sup> Furthermore, it is generally held that the other forms of labor warfare exempted from injunction under the anti-injunction law may be carried on without strike.<sup>66</sup>

Two jurisdictions have come to an opposite result in spite of the anti-injunction laws. In one the definition of "labor dispute" leaves off the concluding expression quoted above; and the courts have continued to enjoin picketing without strike as a tort to which the act is inapplicable.<sup>67</sup> In the other the law was interpreted to extend its exemptions at most to employees and their union; as to outsiders injunction issued as to common law.<sup>68</sup>

<sup>65</sup>Edward Lauf v. E. G. Shinner & Co., Inc. (1938), 303 U. S. 323, 58 S. Ct. 578; Dean v. Mayo (Dist. Ct. 1934), 8 F. Supp. 73, later proceedings (1934), 9 F. Supp. 459, aff'd (1936), 82 F. (2d) 554; Best Steel Sections v. Doe (Sup. Ct. 1939), 10 N. Y. S. (2d) 920. These are all cases in which the closed shop was the objective. Other purposes were in view in the following cases: The Grace Co. v. Williams et al. (CCA, 8th 1938), 96 F. (2d) 478 (collective bargaining privileges); Tri-Plex Shoe Co. v. Cantor (Dist. Ct. 1939), 25 F. Supp. 996 (closed shop and collective bargaining); L. L. Coryell & Son v. Petroleum Workers Union (Dist. Ct. 1937), 19 F. Supp. 749 (better wages and closed shop); May's Furs and Ready To Wear v. Bauer (1940), 282 N. Y. 331, 26 N. E. (2d) 279 (collective bargaining); Krip Holding Corporation v. Canavan (Sup. Ct. 1936), 159 Misc. 3, 288 N. Y. S. 468 (higher wages); Wallace v. International Assn. (1937), 155 Or. 652, 63 P. (2d) 1090 (better wages, hours, conditions). See cases cited notes 69, 70 and 79 *infra*.

<sup>66</sup>Levering & Garrigues Co. v. Morrin (C. C. A., 2nd, 1934), 71 F. (2d) 284; Southeastern Motor Lines v. Hoover Truck Co. (Dist. Ct. 1940), 34 F. Supp. 390; International Brotherhood, etc. v. International U., etc. (C. C. A., 9th, 1939), 196 F. (2d) 871; General Bottle Co. v. Oneto (Sup. Ct. 1939), 12 N. Y. S. (2d) 348. All these decisions involve defendant unions which refuse to work on buildings or to handle goods with which plaintiff employer has had something to do.

<sup>67</sup>Simon v. Schwachman (1938), 18 N. E. 1 (closed shop); Quinton's Market v. Patterson (1939), 21 N. E. (2d) 546 (picketing without strike to compel employer to give his employees a half holiday on Wednesdays); Samuel Hertzog, Inc. v. Gibbs (1936), 3 N. E. (2d) 831 (higher wages). In the last case a strike was said to have failed, converting the dispute into a picketing without strike case. In most jurisdictions having anti-injunction acts this doctrine will be of no value to the employer because picketing without strike for the usual purposes is exempt from injunction by the statute.

<sup>68</sup>Safeway Stores v. Retail Clerks' Union (1935), 184 Wash. 322, 51 P. (2d) 372, criticized in Note (1936) 84 U. of Pa. Law Rev. 771; Adams v. Building Service Employees I. U. Local No. 6 (1938), 84 P. (2d) 1021; Fornili Auto Mechanics' Union Local No. 297, etc. (1939), 93 P. (2d) 422. These decisions may all be cited as case authority for the common law rule. See note 54, *supra*.

In Roth v. Local Union No. 1460 of Retail Clerks Union (Ind. 1939), 24 N. E. (2d) 280, picketing without strike was enjoined on

Two decisions which exemplify the far-reaching benefits derived by outside organizations from the anti-injunction laws are *New Negro Alliance v. Sanitary Grocery Co., Inc.*<sup>69</sup> and *Senn v. Tile Layers Protective Union*.<sup>70</sup> In the former the New Negro Alliance picketed to compel plaintiff to hire a certain percentage of negroes; injunction was denied because the Norris-LaGuardia Act applied. In the latter an outside union demanded that plaintiff employer do no work himself; plaintiff insisted on his right to work but was willing to join the union along with his two employees. The Wisconsin anti-injunction law was held applicable and constitutional, and injunction was denied.

Coming within the picketing without strike classification and approaching the facts of the *Senn* case is *Thompson v. Boekhout*.<sup>71</sup> There plaintiff employer determined to run his projection machine without any help whatsoever, and defendant union picketed to compel him to hire a union worker. Injunction was granted, the anti-injunction law not applying. In the New York courts a rule seems to have developed that no labor dispute exists where a single employer or a small family unit chooses to run a business without employees.<sup>72</sup> The policy

the ground that the purpose of closed shop was unlawful under the anti-injunction law.

<sup>69</sup> (1938) 303 U. S. 552, 58 S. Ct. 703, reversing (1937) 29 F. (2d) 510. Accord: *Siegell v. Newark National Negro Congress* (N. J. Ch. 1938), 2 Lab. Rel. Rep. 290 (under little Clayton act). A New York decision holds the anti-injunction act inapplicable but allows two pickets under the common law because defendant negro union had sufficient interest to justify its action. *Anora Amusement Corporation v. Doe* (Sup. Ct. 1939), 12 N. Y. S. (2d) 400. At common law this picketing would generally be enjoined. *Samuelson v. Green* (1935), 168 Md. 421, 178 Atl. 109; *A. S. Beck Shoe Corp. v. Johnson* (1934), 153 Misc. 363, 274 N. Y. S. 946; Texas, etc., *Operators v. Galveston, etc., Operators* (Tex. Civ. App. 1939), 132 S. W. (2d) 299.

<sup>70</sup> (1937) 301 U. S. 468, 57 S. Ct. 857, aff'g (1936) 222 Wis. 383, 268 N. W. 273.

<sup>71</sup> (1937) 273 N. Y. 390, 7 N. E. (2d) 674.

<sup>72</sup> *Botnick v. Winokur* (Sup. Ct. 1938), 7 N. Y. S. (2d) 6; *Gips v. Osman* (Sup. Ct. 1939), 9 N. Y. S. (2d) 838; *Pitter v. Kaminsky* (Sup. Ct. 1938), 7 N. Y. S. (2d) 10; *Miller v. Fish Workers Union* (Sup. Ct. 1939), 11 N. Y. S. (2d) 278. Accord: *Jensen v. St. Paul M. P. O. M. Local Union No. 356* (1935), 194 Minn. 58, 259 N. W. 811. Cases in accord under the common law and little Clayton acts will be found in notes 34 and 38, *supra*.

The New York rule does not extend to corporations: *Boro Park Sanitary Live Poultry Market v. Haller* (Ct. of Appeals, 1939), 280 N. Y. 48, 21 N. E. (2d) 687; nor to a business in which a large number of employees from dishwashers to manager are represented as "part-

of this rule appears to be that the little business man without employees is no threat to the standards of labor and that to hold he is embroiled in a labor dispute would be to add a burden which, with competitive problems, might go far in causing his species to disappear. In interpreting the statute courts have been influenced by a policy in favor of the little business man which does not operate as strongly for the benefit of large businesses and corporations.

A related holding is that no labor dispute exists and injunction will issue where an employer decides to wind up his business, whether because of labor unpleasanties or otherwise, and a union pickets to compel him to continue.<sup>73</sup> The policy expressed is that an employer has a right to quit without hindrance. In this last instance and in the circumstances of *Thompson v. Boekhout* a literal application of the anti-injunction act would seem to prevent the issuance of injunction. A few federal cases in point so hold, stating that a controversy concerning terms and conditions of employment and whether they should continue is raised between the union and the employer.<sup>74</sup>

Still another variant of the picketing without strike case occurs where an outside union seeks to oust a rival union with which the employer has a collective bargaining contract. The outside union may demand a closed shop or simple collective bargaining privileges, and its acts tend to cause a breach of contract between the employer and the rival union. This situation more than any other arouses sympathy for the hapless employer. He has bargained collectively with a union, and yet he is harassed by the belligerent tactics of an outside union. The solution to this problem should permit the unions to contest with each other but without causing injury to the employer. A majority of the courts under the common law and under the Clayton Act (and

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ners", *Saito v. Waiters and Waitresses Union Local No. 2* (Sup. Ct. 1939), 12 N. Y. S. (2d) 283. Nor does it apply to a case where all employees strike for better wages and hours, and thereafter plaintiff employer decides to run his business alone. *Baillis v. Fuchs* (1940) 283 N. Y. 133, 27 N. E. (2d) 812.

<sup>73</sup> *Yellow Cab O. Co. v. Taxicab Drivers Local U. No. 889* (Dist. Ct. 1940), 35 F. Supp. 493; *Paul v. Mencher* (Sup. Ct. 1938), 7 N. Y. S. (2d) 821; *Wishong v. Jones* (Sup. Ct. 1938), 8 N. Y. S. (2d) 2.

<sup>74</sup> *Rohde v. Dighton* (Dist. Ct. 1939), 27 F. Supp. 149; *Diamond Full Fashioned Hosiery Co. v. Leader* (Dist. Ct. 1937), 20 F. Supp. 467; *Richard H. Oswald Co. v. Leader* (1937), 20 F. Supp. 876.

state derivatives) have approached this solution by issuing injunction against picketing.<sup>75</sup> That defendant union was doing acts tending to cause breach of a contract between the employer and the rival union is an additional reason often relied upon for granting relief. Contrariwise, a minority of courts have denied injunctive relief, asserting that defendant union has a legally sufficient interest to strengthen itself by attacking the status of a rival union as bargaining representative of the employees.<sup>76</sup> To issue injunction, it is said, would frequently deprive the defendant union of the only effective way in which it could combat its rival. That acts are done tending to cause breach of a contract between the rival union and the employer is a circumstance which must yield to the superior privilege of defendant union. Of course, all this is of small comfort to the beleaguered employer.

If the defendant union actually represents some employees and is not an outsider, the case is removed from the picketing without strike category. The defendant union can be seen to have a direct interest in the employee-members and in negotiating a collective bargaining agreement. Again, however, the employer is in an unhappy situation. If he yields to one union, he calls down upon himself the wrath of the other. The authorities are divided as to whether injunction should issue; probably the tendency at common law is to grant equitable relief.<sup>77</sup> Some

<sup>75</sup> The picketing without strike cases cited note 54, *supra*, are authority for this proposition; also the cases cited note 80, *infra*; Tracey v. Osborne (Sup. Ct. 1917), 226 Mass. 25, 114 N. E. 959; Wolchak v. Wiseman (1932), 145 Misc. 268, 259 N. Y. S. 225; Texas, etc., Operators v. Galveston, etc., Operators (Tex. Civ. App. 1939), 132 S. W. (2d) 299. Few cases of this type arose under the Clayton Act, but Central Metal Products Corp. v. O'Brien (Dist. Ct. 1922), 278 Fed. 827; Hendrickson Motor Truck Co. v. International Ass'n of Machinists (Ill. App. Ct. 1939), 22 N. E. (2d) 969; and Miller's Inc. v. Journeymen Tailors Union (N. J. Ct. of Errors and Appeals, 1940), 15 A. (2d) 824, are in accord.

<sup>76</sup> McKay v. Retail Automobile Salesmen's L. U. No. 1067 (Calif. 1940), 106 P. (2d) 373; Greenwood v. Building Trades Council of Sacramento (1925), 71 Cal. App. 159, 233 P. 823; Smythe Neon Sign Co. v. Local Union No. 405 (Iowa 1939), 284 N. W. 126; Stillwell Theatre, Inc. v. Kaplan (1932), 259 N. Y. 405, 182 N. E. 63; Nann v. Raimist (1931), 255 N. Y. 307, 174 N. E. 690; J. H. & S. Theatres, Inc. v. Fay (1932), 260 N. Y. 315, 183 N. E. 509; see Haden Employees' Ass'n v. Lovett (Tex. Civ. App. 1938), 122 S. W. (2d) 230. The two California cases are weakened by the fact that in each the union and not the employer sought injunctive relief.

<sup>77</sup> Goyette v. C. V. Watson Co. (Supreme Ct. 1923), 245 Mass. 577, 140 N. E. 285; Plant v. Woods (Sup. Ct. 1900; Holmes dissenting), 176

of the authorities granting injunction are unsatisfactory in that they rely in part on the fact that defendant union's picketing tends to cause breach of a contract between the employer and the rival union; thus, these decisions leave a question as to a case in which neither union has a contract. On the other hand, some of the authorities denying injunction are weakened by the fact that one of the unions, and not the employer, is seeking equitable relief. It is possible that an employer will secure injunction in an inter-union dispute where neither of the disputing unions will be successful in that regard. Another reason for the paucity of clear common law authority is that instances of inter-union disputes have only become common in recent years, and they have occurred mainly in states having anti-injunction laws.

Under the anti-injunction laws where defendant union strikes and pickets to oust a rival union, a labor dispute concerning representation or association of employees clearly exists; and injunction is denied unless the terms of the acts are complied with.<sup>78</sup> If the defendant is an outside union which

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Mass. 492; 57 N. E. 1011 (union is plaintiff); *Fairbanks v. McDonald* (Sup. Ct. 1914), 219 Mass. 291, 196 N. E. 1000 (same); *Herzog v. Cline* (1927), 131 Misc. 816, 227 N. Y. S. 462; *Erdman v. Mitchell* (1903), 207 Pa. 79, 56 A. 327 (union is plaintiff); *Mische v. Kaminski* (1937), 127 Pa. Super. 66, 193 A. 410; the *Rice* and *United States Premier Food Store* cases cited note 78. Accord under little Clayton act: *Jordan's Wearing Apparel v. Retail Sales C. Union* (N. J. Ch. 1937), 193 A. 806. *Contra*: *Music Hall Theatre v. Moving Picture M. O. Local No. 165* (1933), 249 Ky. 639, 61 S. W. (2d) 283; *National P. Ass'n of Steam Fitters v. Cumming* (1902), 170 N. Y. 315, 63 N. E. 369 (union is plaintiff); *Reform Club of Masons & Plasterers v. Laborers' Union Protective Society* (1899), 29 Misc. 245, 60 N. Y. S. 388 (same); cases cited note 76 (but see dictum in *McKay* case at pp. 382, 383).

The cases above in which injunction issues on a union's petition are decisions which imply strongly that injunction would issue on an employer's complaint.

<sup>78</sup> *Houston & North Texas Motor Freight Lines v. Local Union No. 886* (Dist. Ct. 1938), 24 F. Supp. 619; *Fur Workers Union, Local No. 72 v. Fur Workers Union* (Ct. of Appeals, Dist. of C., 1939), 105 F. (2d) 1; *Sharp & Dohme v. Stroage Warehouse Employees Union* (Dist. Ct. 1938), 24 F. Supp. 701; *The Grace Co. v. Williams* (C. C. A., 8th 1938), 96 F. (2d) 478; *United Electrical R. V. Mach. Workers v. I. B. of E. Workers* (C. C. A., 2d, 1940), 115 F. (2d) 488; *Bergman v. Levenson* (1939), 13 N. Y. S. (2d) 455; cases cited note 79. *Contra*: *United Electric Coal Cos. v. Rice* (C. C. A., 7th, 1935), 80 F. (2d) 1; *Union Premier Food Stores v. Retail Food C. & M. Union* (C. C. A., 3rd, 1938), 98 F. (2d) 821 (National Labor Relations Act complicated case).

<sup>79</sup> *Milk Wagon Drivers' Union v. Lake Valley F. Products* (1940), 61 S. Ct. 122; *Lauf v. E. G. Shinner & Co.* (1938), 303 U. S. 323, 58



pickets, the weight of authority is that a labor dispute is current, and injunction will be denied until the procedural requirements of the anti-injunction law are met.<sup>79</sup> Under both of these propositions it seems immaterial that defendant union's acts tend to cause a breach of contract between the employer and the rival union. A few of the courts have come to an opposite conclusion as to an outside union by construction of the statute and a refusal to find a labor dispute; injunction then issues as at common law.<sup>80</sup> Thus, there has been ample occasion for the employer enmeshed in a local C.I.O.-A.F.L. contest to lament that he has been left without remedy under the anti-injunction enactments even though he is willing to bargain collectively and has acted with fairness to all.

By construction of the National Labor Relations Act<sup>81</sup> (NLRA) with the anti-injunction law there has been a promise of relief to an innocent employer whose business is in or affects interstate commerce and who is embroiled in an inter-union dispute. Section 8(5) of the NLRA vouchsafes to the representative of the majority of employees in an appropriate unit

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S. Ct. 578, reversing 82 F. (2d) 68; *Donnelly Garment Co. v. International L. G. W. Union* (C. C. A., 8th, 1938), 99 F. (2d) 309, aff'g 23 F. Supp. 998; *International Brotherhood v. International U., etc.*, (C. C. A., 9th, 1939), 196 F. (2d) 871; *May's Furs and Ready to Wear v. Bauer* (1940), 292 N. Y. 131, 26 N. E. (2d) 279; *Edjomac Amusement Corp. v. Empire State Motion Picture Operators' Union* (1937), 273 N. Y. 647, 8 N. E. (2d) 329; *Blanchard v. Golden Age Brewing Co.* (1936), 188 Wash. 396, 63 P. (2d) 372 (anti-injunction act held applicable in terms but unconstitutional).

<sup>80</sup> *Calif. State Brewers' Institute v. International Brotherhood of Teamsters, C. S. and H.* (Dist. Ct. 1938), 25 F. Supp. 870; *Trommer v. Brotherhood of Brewery Workers of Greater N. Y.* (1938), 3 N. Y. S. (2d) 782; *Stalban v. Friedman* (1939), 11 N. Y. S. (2d) 343; *Spinner v. John Doe* (1939), 13 N. Y. S. (2d) 449. These cases are of little authority in the light of the cases cited note 79, *supra*.

In Washington the anti-injunction law was held unconstitutional in so far as it deprived courts of jurisdiction in this type of case, and injunction issued under the common law. *Blanchard v. Golden Age Brewing Co.*, note 79, *supra*; *United Union Brewing Co. v. Beck* (1939), 93 P. (2d) 772. It has already been noted that the Washington court does not extend the exemptions of the anti-injunction law to outside unions; notes 54 and 68, *supra*. These decisions make of doubtful constitutionality a legislative attempt in Washington to extend exemptions to the picketing without strike case.

In Massachusetts the decisions cited in note 67, *supra*, indicate that the anti-injunction law will not apply in the type of case here discussed.

<sup>81</sup> Note 2, *supra*. The argument which follows may be used as to intrastate business in such states as have labor relations acts. See note 3, *supra*.

the right to bargain collectively, and §8(3) prohibits an employer from entering into a closed shop contract with any union except one which is such a majority representative. Therefore, where a majority representative has been certified, a minority or outside union which pickets for exclusive collective bargaining privileges or for the closed shop has in view causing the employer to do an illegal act. The purpose is inconsistent with the administration of the NLRA. A few decisions have said no labor dispute exists, and injunction has issued without compliance with the anti-injunction act.<sup>82</sup> A logical implication of these decisions is that even where a union is not certified but is proved to be in the majority, the minority or outside union may be restrained from waging warfare for the closed shop or exclusive bargaining privileges. In this latter situation, however, the bulk of decisions hold that a labor dispute exists and that procedural requirements of the anti-injunction laws must be satisfied.<sup>83</sup> In fact, their language is such as to make doubtful the authority of those decisions which have granted injunction where a minority union demands a closed shop or collective bargaining privileges as against a certified majority union. The employer's prospects under the NLRA of deducing a right

<sup>82</sup> *Oberman & C. v. United Garment Workers of America* (Dist. Ct. 1937), 21 F. Supp. 20; *Union Premier Food Stores v. Retail Food C. & M. Union* (C. C. A., 3rd, 1938), 98 F. (2d) 821; *Bloedel Donovan Lumber Mills v. International, etc.* (Wash. 1940), 102 F. (2d) 270; see *Cupples Co. v. American Federation of Labor* (Dist. Ct. 1937), 20 F. Supp. 894, 897, 899.

An amendment to the Pennsylvania anti-injunction act declared that the act shall not apply where a union engages in a course of conduct calculated to coerce an employer to violate the NLRA or Pennsylvania labor relations law. 43 Purdon's Penn. Stat. Ann., 1939 Cum. Pocket Part, § 206d.

<sup>83</sup> *Lund v. Woodenware Workers Union* (Dist. Ct. 1937), 19 F. Supp. 607; *Blankenship v. Kurfman* (C. C. A., 7th, 1938), 96 F. (2d) 450; *Donnelly Garment Co. v. International L. G. W. Union* (C. C. A., 8th, 1938), 99 F. (2d) 309 and 21 F. Supp. 807 (dissenting opinion); *Grace Co. v. Williams* (C. C. A., 3th, 1938), 96 F. (2d) 478; *Fur Workers Union Local No. 72 v. Fur Workers Union* (Ct. of App., D. of C., 1939), 105 F. (2d) 1; *United Electrical R. v. Mach. Workers v. I. B. of E. Workers* (C. C. A., 2nd, 1940), 115 F. (2d) 488 (plaintiff majority union fails to recover damages of defendant minority union); *Pauly Jail Bldg. Co. v. International Ass'n* (Dist. Ct. 1939), 29 F. Supp. 15; *Houston & North Texas M. F. Lines v. Local Union No. 886* (Dist. Ct. 1938), 24 F. Supp. 619; *Cupples Co. v. American Federation of Labor* (Dist. Ct. 1937), 20 F. Supp. 894. Wis. Stat. (1937), §§ 111.09(1) and 11.17 preserved the rights of minority groups to wage labor warfare in Wisconsin; for legislative changes see notes 148 and 149, *infra*.

vindicated in equity against the vicissitudes of inter-union warfare are dubious in the face of the broad definitions of the anti-injunction laws.

Remaining for discussion are a variety of controversies to which the anti-injunction acts are literally applicable but which exhibit purposes or circumstances clearly removing them from the public policy of the legislation. It has been noted that a controversy between A and B, owners of two factories, concerning a sale and purchase of real estate; or concerning A's demand that B pay his employees higher wages in order to even conditions of competition; or, concerning A's demand that B purchase A's factory; is one to which the Norris-LaGuardia Act is literally applicable.<sup>84a</sup> The same may be said as to a fence dispute between X and Y both of whom happen to be employees of A.<sup>84b</sup> It may be said as to a demand by Z union of A for \$100,000 to be paid into the union treasury.<sup>84c</sup> Also it may be said as to the demand by a group of unemployed that A hired them.<sup>84d</sup> Sections 13(a) and (b) of the Norris-LaGuardia Act define a case involving or growing out of a labor dispute in terms of parties to the litigation irrespective of the subject matter of the dispute.<sup>85</sup> To confine the legislation to the objects of public policy intended it is necessary to read into §§ 13(a) and (b) the definition of "labor dispute" found in § 13(c), and all the decisions do just that. Hence the examples cited are probably not within the scope of the anti-injunction law.

Malicious labor warfare for no other purpose than to injure a business or to drive it from competition with other businesses will probably not be deemed a labor dispute and will be enjoined under the common law.<sup>86</sup> If an employer is willing to meet all

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<sup>84a</sup> *Donnelly Garment Co. v. International L. G. W. Union* (Dist. Ct. 1937), 20 F. Supp. 767, 769, 770, 772.

<sup>84b</sup> Note 14, *supra*.

<sup>84c</sup> *Scavenger Service Corporation v. Courtney* (C. C. A., 7th, 1936), 85 F. (2d) 825; *Yellow Cab O. Co. v. Taxicab Drivers Local U. No. 889* (Dist. Ct. 1940), 35 F. Supp. 403; *United States v. Norris* (Dist. Ct. 1918), 255 F. 423 (Clayton Act, § 20, not applicable); *Hertzog v. Cline* (1927), 131 Misc. 816, 227 N. Y. S. 462 (common law); *Falciglia v. Gallagher* (1937), 299 N. Y. S. 890; see *National P. Ass'n of Steamfitters v. Cumming* (1902), 170 N. Y. 315, 63 N. E. 369.

In *Busch Jewelry Co. v. United Retail E. Union Local 830* (1938), 7 N. Y. S. (2d) 872, a fake union organized to take up the activities of another union which had been enjoined was denied the exemption of the anti-injunction law. See also *Hoffman's Vegetarian Restaurant Co., Inc. v. Lee* (1939), 10 N. Y. S. (2d) 287.

union standards and still is picketed, the inference is that the labor warfare is malicious. A related type of case is one where a union combines with an employer to wage warfare against other businesses to drive out competition.<sup>87</sup> Again union standards are not in controversy and probably no "labor dispute" exists. Still another type of case to which the anti-injunction law is inapplicable is that in which a business organization assumes to practice methods of labor warfare to attain mercantile ends.<sup>88</sup> There is also the possibility that a union which has closed its membership unreasonably may not claim the benefits of the legislation where it pickets to cause an excluded worker to be discharged.<sup>89</sup>

All the cases here discussed demonstrate that the anti-injunction laws have measurably broadened the area of labor dispute in which equitable restraint will not issue except after fulfillment of stringent procedural requirements. But they demonstrate also that there is a residue of flagrantly unlawful purposes and special circumstances which render a case not a "labor dispute." In these latter cases injunction issues as at common law.

### III.

Assuming the legality of purposes and existence of a labor dispute, what forms may labor warfare take under the anti-injunction acts as compared with those permitted under the common law and Clayton acts? This question is complicated by the circumstance that at common law it occasionally appears that all the lawful methods may be permitted for one purpose whereas a more restricted number may be permitted for another.<sup>90</sup> While measuring the permitted means according to the objects of the union may have policy to commend it, this viewpoint is inconsistent with common law theory. If a labor

<sup>87</sup> U. S. Lumber Institute (Dist. 1940), 35 F. Supp. 191 (indictment under Sherman Act).

<sup>88</sup> Columbia River Packers Ass'n v. Hinton (Dist. Ct. 1939), 34 F. Supp. 970; Fillett v. Batolomio (App. Div. 1938), 1 N. Y. S. (2d) 316; People v. Distributors Division (1938), 7 N. Y. S. (2d) 185 (association of distributors enjoined from picketing to compel producers to sell to, and retailers to buy from, the association only); Stolper v. Straughn (1940), 23 N. Y. S. (2d) 604.

<sup>89</sup> Dorrington v. Manning (Pa. Super. Ct. 1939), 4 A. (2d) 886.

<sup>90</sup> E. g., possibly a court will enjoin secondary picketing or secondary boycott for the closed shop but permit picketing and strike; whereas for higher wages all these methods may be permitted. Cf. cases cited note 36, *supra*; notes 93, 113, 123, and 131, *infra*.

dispute is for an unlawful purpose, all concerted efforts (possibly excepting simple publication of the facts) are enjoined; this is by far the most usually applied rule.<sup>91</sup> In general, then, in cases where the purpose is lawful are to be found the limits of lawful warfare.

Everywhere and under all legislation the strike is lawful.<sup>92</sup> Some decisions have said a strike for any purpose may not be enjoined.<sup>93</sup> These decisions seem to confuse the right of an individual to quit work and the privilege of a union to strike. Equitable principles, as well as constitutional doctrine concerning involuntary servitude, prevent injunction against exercising the former right.<sup>94</sup> But calling a concerted strike is the exercise of a power of a union which has often been enjoined where the purpose is unlawful.<sup>95</sup>

Most often the form of labor warfare which provokes the employer to seek equitable relief is picketing. Picketing may be defined as patrolling activities carried on at or near an employer's place of business which are intended to inform employees and customers of the existence of a labor dispute and to persuade them to cease dealing with the employer. There is older authority that all picketing is unlawful,<sup>96</sup> but today the

<sup>91</sup> In addition to cases heretofore cited wherein purposes have been declared unlawful, see citation of authority in 11 Am. Jur. 543; 12 C. J. 591; see also Jaffin, *Theorems in Anglo-American Labor Law*, (1931) 31 Col. L. Rev. 1104.

<sup>92</sup> No authority need be cited for this proposition. Most of the common law cases heretofore cited in which injunctions are denied involve strikes. The anti-injunction laws and the Clayton Act (and state derivatives) all sanction the strike. See notes 10 and 15, *supra*.

<sup>93</sup> *New Bedford Fish Co. v. United Sea Workers of Philadelphia* (U. S. Dist. Ct., E. D. Pa., 1938), 2 Lab. Rel. Rep. 589 (decision under *Norris-LaGuardia Act*); *Parkinson Co. v. Building Trades Council* (1908), 154 Cal. 581, 98 Pac. 1927; *Walter A. Wood Mowing & R. Machine Co. v. Toohy* (1921), 114 Misc. 185, 186 N. Y. S. 95 (1921); *National P. Ass'n of Steamfitters v. Cumming* (1902), 150 N. Y. 315, 63 N. E. 369.

<sup>94</sup> *Pomeroy's Equity Jurisprudence* (4th ed.), §§ 1710-1712.

<sup>95</sup> *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1894), 62 Fed. 803; *R. An W. Hat Shop, Inc. v. Sculley* (1922), 98 Conn. 1, 118 A. 55; *Service Wood Heel Co. v. Mackey* (Me. 1936), 199 N. E. 400; *Yankee Network v. Gibbs* (Mass. 1936), 3 N. E. (2d) 228; *W. A. Snow Iron Works v. Chadwick* (1917), 227 Mass. 382, 116 N. E. 801; *N. J. Printing Co. v. Local No. 26* (1923), 95 N. J. Eq. 108, 122 Atl. 622; *Schlang v. Ladies Waist Makers' Union* (1910), 67 Misc. 221, 124 N. Y. S. 289; *Erdman v. Mitchell* (1903), 207 Pa. 79, 56 A. 327.

<sup>96</sup> *Atchinson, T. & S. F. Ry. v. Gee* (Dist. Ct. 1905), 139 Fed. 528; *Moore v. Cooks, Waiters' and Waitresses' Union* (1919), 39 Cal. App. 538, 179 Pac. 417; *Ellis v. Journeyman Barbers' I. U. of America*

common law authorities are virtually unanimous in agreeing that picketing can be peaceful and lawful.<sup>97</sup> The anti-injunction acts exempt from equitable restraint giving publicity to a labor dispute by patrolling, and the cases decided under them are without exception in permitting picketing.<sup>98</sup>

The Clayton Act and state derivatives prohibit injunctions directed against peacefully persuading persons to strike or to cease patronizing an employer or against attending at any place for the purpose of peacefully obtaining or communicating information.<sup>99</sup> This would appear to permit peaceful picketing, but the United States Supreme Court decision of *Truax v. Corrigan*<sup>100</sup> had a severely restrictive effect on the judicial concept of what is peaceful picketing. Close reading of all the opinions in the United States Supreme Court and in the Arizona Supreme Court (from which the case came) impresses one that the prevailing opinion understood the facts to be that the picketing was abusive, coercive and uproarious and that the circulars distributed were false and intimidating. On these facts, statutory denial of injunction to an employer against the pickets might well be violative of due process and equal protection of the laws of the state. The dissenters, Justices Holmes and Brandeis, as well as the state supreme court, assumed the facts to show no

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(1922), 194 Iowa 1170, 191 N. W. 111; *Beck v. Railway Teamsters Protective Union* (1898), 118 Mich., 497, 77 N. W. 13; *Elkind & Sons, Inc. v. Retail Clerks Assn.* (1933), 114 N. J. Eq. 586, 169 A. 494; *Webb v. Cooks' Waiters' and Waitresses' Union* Tex. Civ. App. 1918), 205 S. W. 465; *Jensen v. Cooks' & Waiters' Union* (1905), 39 Wash. 531, 81 Pac. 1069.

<sup>97</sup> *Riggs v. Tucker Duck & Rubber Co.* (Ark. 1938), 119 S. W. (2d) 507; *E. M. Loew's Enterprises v. International A. T. S. E.* (Conn. 1939), 6 A. (2d) 321; *Hughes v. Kansas City Motion Picture M. O. Local 170* (Mo. 1920), 221 S. W. 95, 282 Mo. 304; *Empire Theater Co. v. Cloke* (1917), 53 Mont. 183, 163 Pac. 107; *Steffes v. Motion Picture Machine Operators Union of Minneapolis* (1917), 136 Minn. 200, 161 N. W. 524; *White Mountain Freezer Co. v. Murphy* (1917), 78 N. H. 398, 101 A. 357; *Exchange Bakery & Restaurant v. Rifkin* (1927), 245 N. Y. 260, 157 N. E. 130; *Kirmse v. Adler* (1933), 311 Pa. 78, 166 A. 566; *Carpenters and Joiners Union v. Ritter's Cafe* (Tex. Civ. App. 1940), 138 S. W. (2d) 233; *Kimbel v. Lumber & Saw Mill Workers Union No. 2575* (Wash. 1937), 65 P. (2d) 1066. Kentucky has enacted a statute declaring that peaceful picketing is lawful. L. 1940, S. B. No. 268, Art 3, Sec. I.

<sup>98</sup> Note 15, *supra*. Nearly all the cases earlier cited in which a labor dispute was found current and in which injunction was denied involved picketing.

<sup>99</sup> Note 19, *supra*.

<sup>100</sup> (1921) 257 U. S. 312, 42 S. Ct. 124, reversing 570 (1918) 20 Ariz. 7, 176 Pac. 570.

unruly patrolling, and they argued that the statutes did nothing more than to legalize, or to confirm the legality of, peaceful picketing. The effect of this decision was to cast a doubt as to the constitutionality of a little Clayton act if it were construed to permit picketing too broadly. In consequence, the number of pickets and type of activities permitted under the acts were very much limited during the 1920's.<sup>101</sup> But in the last decade a liberalization in judicial notions as to peaceful picketing is noticeable.<sup>102</sup>

It is to be noted that the rule that peaceful picketing is lawful prevails although this activity has the effect of persuading customers to cease to patronize the employer. Further, it has the intended effect of causing employees or would-be employees to cease working for the employer. Common law authority exists that an employer has sufficient property interest in an employment for a term<sup>103</sup> or at will<sup>104</sup> to have an action in equity to prevent interference with that relationship. But this authority seems of little force today in view of the virtually unanimous holdings that peaceful picketing will not be enjoined. The "yellow dog" contracts, in which an employee promised not to join a union or to quit work when he did, was a device utilized to discourage unionization. It also was a basis for injunction to prevent persuasions—including picketing—causing employees to breach their "yellow dog" contracts.<sup>105</sup>

<sup>101</sup> E. g., *Greenfield v. Central Labor Council* (1922), 104 Or. 236, 192 Pac. 770, 207 Pac. 168.

<sup>102</sup> That picketing may be peaceful and lawful under the Clayton Act is well established. *Great Northern Ry. Co. v. Local Great Falls Lodge of I. A. of M.*, (Dist. Ct. 1922), 283 F. 557; *Fenske Bros. v. Uphosters' International Union* (1934), 358 Ill. 239, 193 N. E. 112; *Bayonne Textile Corp. v. American, etc., Silk Workers* (Ct. of Errors and Appeals 1934), 116 N. J. Eq. 146, 172 A. 551; *Blumauer v. Portland M. P. M. O. P. Union* (1933), 141 Or. 399, 17 P. (2d) 1116.

<sup>103</sup> *United Shoe Machinery Corp. v. Fitzgerald* (1921), 237 Mass. 537, 130 N. E. 86; *Rice, Barton v. Fales Machine, etc., Co. v. Willard* (1922), 242 Mass. 566, 136 N. E. 629; *Walton Lunch Co. v. Kenney* (1920), 236 Mass. 310, 128 N. E. 429.

<sup>104</sup> *Vegeahn v. Guntner* (1896), 167 Mass. 92, 44 N. E. 1077; *Jonas Glass Co. v. Glass Bottle Blowers' Assn.* (1910), 77 N. J. Eq. 219, 79 A. 262; *Thacker Coal Co. v. Burke* (1906), 59 W. Va. 253, 53 S. E. 161. See cases cited Landis, *Cases on Labor Law*, p. 81, n. 1.

In *Diamond Black Coal Co. v. United Mine Workers* (1920), 188 Ky. 477, 222 S. W. 1079, injunction was denied against peaceful persuasions of employees at will to join a union where the policy of the employer was to discharge union men.

<sup>105</sup> *Hitchman Coal Co. v. Mitchell* (1917), 245 U. S. 229, 38 S. Ct. 65; *Gassaway v. Borderland Coal Corporation* (C. C. A., 7th, 1921),

Today practically all the anti-injunction laws contain a provision declaring the "yellow dog" contract unenforceable and no basis for equitable relief.<sup>106</sup> States without anti-injunction legislation as well have enacted similar provisions.<sup>107</sup> It may safely be said that the "yellow dog" contract has diminished to the vanishing point in legal efficacy.

Of course, threatening and violent picketing as well as mass picketing are enjoinable under the anti-injunction acts, the Clayton Act and under the common law.<sup>108</sup> False and intimidating placards and banners carried by pickets will also be enjoined under the common law and under the legislation mentioned.<sup>109</sup> The differences between the plaintiff employer's condition before and under the anti-injunction acts is that under the latter he must comply with stringent procedural requirements and will find that judicial attitudes toward permissible picketing have been liberalized. However, it must be said that how readily findings of intimidation will be made and on how satisfactory a proof depend in some degree on the discretion of the trial judge who may or may not be favorably disposed toward labor activities.

Because peaceful picketing is carried on to communicate facts as well as to persuade, claims that it is constitutionally protected as an exercise of the right of free speech have been put forth. These claims to a substantial extent have been sustained by recent United States Supreme Court holdings that

278 Fed. 56; *International Organization, U. M. W. A. v. Red Jacket Consolidated Coal & Coke Co.* (C. C. A., 4th, 1937), 18 F. (2d) 839; *Thacker Coal Co. v. Burke*, Cited note 104.

<sup>106</sup> § 3 of the Norris-LaGuardia Act.

<sup>107</sup> E. g., *Ariz. Rev. Code*, 1934 Supp., § 1360a; *Calif Labor Code* of 1937, §§ 920-923; *Conn. Rev. Stat.* (1930), § 6209; *Ill. State Bar Stat.* (1939), ch. 48, § 2b.

<sup>108</sup> *Newton v. LaCled Steel Co.* (C. C. A., 7th, 1935), 80 F. (2d) 636; *Fenske Bros. v. Upholsterers' International Union* (1934), 358 Ill. 239, 193 N. E. 112; *Bull v. International Alliance* (1925), 119 Kan. 713, 241 Pac. 459; *Underhill v. Murray* (1904), 117 Ky. 640, 78 S. W. 482; *Busch Jewelry Co. v. United R. E. Union* (1939), 281 N. Y. 150, 22 N. E. (2d) 320; *Wallace v. International Ass'n* (1937), 155 Or. 673, 63 P. (2d) 1090.

Violent or intimidating picketing is generally a criminal offense. *Commonwealth v. Ramey* (Ky. Ct. of Appeals, 1939), 132 S. W. (2d) 342.

<sup>109</sup> *Yellow Cab O. Co. v. Taxicab Drivers Local U. No. 889* (Dist. Ct. 1940), 35 F. Supp. 403; *May's Furs and Ready to Wear v. Bauer* (1940), 282 N. Y. 331, 26 N. E. (2d) 279; *Busch Jewelry Co. v. United R. E. Union* (1939), note 108, *supra*; *Wiest v. Dirks* (Ind. 1939), 20 N. E. (2d) 969.



state laws forbidding all picketing are unconstitutional as violative of rights guaranteed by the Fourteenth Amendment.<sup>110</sup> The exact bounds of constitutionally protected picketing are still not clear. It cannot be said definitely that picketing without strike in a "labor dispute" as that term has been interpreted in federal decisions is constitutionally protected.<sup>111</sup> But certainly peaceful picketing with strike for the usual purposes may not be prohibited or curtailed unreasonably by state action—legislative or judicial.

Publication of the facts of a dispute coupled with persuasion in newspapers, or by word of mouth or by signs away from the location of the dispute is not what is ordinarily thought of as picketing. Under the common law decisions permitting peaceful picketing, this method of labor warfare is clearly lawful. The anti-injunction acts and the Clayton acts merely confirm pre-existing law in forbidding restraint against general publication of the facts of a dispute.<sup>112</sup> Even in jurisdictions where picketing without strike would be enjoined, it would seem that the outside union could exercise its right of free speech and press by publicizing the facts of the controversy.<sup>113</sup> The same might be said about a strike for the closed shop in a jurisdiction where the strikers are not permitted to picket for that purpose.

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<sup>110</sup> *Thornhill v. State of Alabama* (1940), 60 S. Ct. 736; *Carlson v. People of State of California* (1940), 60 S. Ct. 746. Accord: *People v. Harris* (Colo. 1939), 91 P. (2d) 989; *American Federation of Labor v. Bain* (Ore. 1940), 106 P. (2d) 544; *San Angelo v. Amalgamated Meat Cutters* (Tex. Civ. App. 1940) 139 S. W. (2d) 843.

<sup>111</sup> *Swing v. American Federation of Labor* (1939), 372 Ill. 91, 22 N. E. (2d) 857 (injunction granted); first dissent in *McKay v. Retail Automobile Salesmen's L. U. No. 1067* (Calif. 1940), 106 P. (2d) 373. For decisions which apparently hold that peaceful picketing will not be enjoined whatever the purpose, see *French Sardine Co. v. Deep Sea Purse Seine Fisherman's Union* (Calif. Super. Ct. 1938), 2 Lab. Rel. Rep. 840; *Thompson v. Boekhout*, 291 N. Y. S. 572, 249 App. Div. 77, aff'd (1937), 273 N. Y. 390, 7 N. E. (2d) 674; *Bieber v. Bininbaum* (1938), 6 N. Y. S. (2d) 63.

<sup>112</sup> Notes 10 and 15, *supra*; *Lietzman v. Radio Broadcasting Station WCFL* (1935), 282 Ill. App. 203; *Smythe Neon Sign Co. v. Local Union No. 405* (Iowa, 1939), 284 N. W. 126; *Dehan v. Hotel and Restaurant Employees* (La. Ct. of App. 1936), 159 So. 637; *Evening Times Picketing & Publishing Co. v. American Newspaper Guild* (N. J. Ct. of Errors and Appeals, 1938), 199 A. 598.

<sup>113</sup> *John R. Thompson Co. v. Delicatessence and C. W. U.* (N. J. Ch. 1939), 8A. (2d) 130.

Where the right is abused, the usual remedy is by law action for slander or libel rather than by suit in equity.<sup>114</sup> But authority exists both at common law and under the legislation here discussed that false, abusive and intimidating publication will be enjoined.<sup>115</sup> In most instances such injunction issues in connection with violent or intimidating picketing.

If the bounds of lawful picketing are transgressed, the normal rule has been to enjoin that which is unlawful. But there is substantial authority under the common law and under the little Clayton acts that violent or intimidating picketing forfeits the entire privilege.<sup>116</sup> Decisions so holding under the latter acts may be criticized on the ground that § 20 of the Clayton Act provides and was intended to declare that when injunction issues in a proper case, it shall not restrain peaceful picketing. Similarly, the anti-injunction laws permit of injunction against intimidation after procedural requirements are met but are scrupulous to forbid it against peaceful picketing. Nevertheless, in the New York court the development has been that where a finding is made that any picketing carried on will be violent and threatening, then all picketing will be restrained.<sup>117</sup>

Closely related to mass picketing is the sit-down strike. The right to picket does not include the right to trespass, and trespasses which have been repeated and which are threatened may be enjoined on proper allegation of irreparable injury and

<sup>114</sup> Pomeroy's Equity Jurisprudence (4th edition), §§ 1895, 2050-2052.

<sup>115</sup> Authorities cited note 112, *supra*; Pauly Jail Bldg. Co. v. International Ass'n (Dist. Ct. 1939), 29 F. Supp. 15; Yellow Cab Co. v. Taxicab Drivers Local U. No. 889 (Dist. Ct. 1940), 35 F. Supp. 403; Wiest v. Dirks (Ind. 1939), 20 N. E. (2d) 969; Olympia Operating Co. v. Costello (1932), 278 Mass. 125, 179 N. E. 804; Nann v. Raimist (1931), 255 N. Y. 307, 174 N. E. 690; J. H. & S. Theatres, Inc. v. Fay (1932), 260 N. Y. 315, 183 N. E. 509; Carter v. Bradshaw (Tex. Civ. App. 1940), 138 S. W. (2d) 187.

<sup>116</sup> Common law: Local Union No. 313 Hotel & Restaurant Employees v. Stathakis (1918), 135 Ark. 86, 205 S. W. 450; Nann v. Raimist (1931), 255 N. Y. 307, 174 N. E. 690; Bomes v. Providence Local No. 223 (1931), 51 R. I. 500, 155 A. 581. Little Clayton acts: Ossey v. Retail Clerk's Union (1927), 326 Ill. 405, 158 N. E. 162; Bull v. International Alliance (1925), 119 Kan. 713, 241 Pac. 459.

<sup>117</sup> Busch Jewelry Co. v. United Retail Employee's Union Local 830 (1939), 281 N. Y. 150, 22 N. E. 320; Baillis v. Fuchs (1940), 283 N. Y. 133, 27 N. Y. (2d) 812.

inadequate damages at law.<sup>118</sup> Hence, it is clearly established under the common law and under all legislation that the sit-down strike may be enjoined.<sup>119</sup> Under the Clayton acts and the anti-injunction laws procedural requirements should be met before relief is obtained, but there is authority that the sit-down strike is so beyond legal justification that injunction will issue as at common law.<sup>120</sup>

Another method of industrial warfare about which there is much discussion is the secondary boycott. A remarkable confusion characterizes the learning about the secondary boycott because of the manifold activities to which the term is applied. A Wisconsin statute<sup>121</sup> fairly accurately defines it as a "conspiracy to cause injury to one with whom no labor dispute exists, whether by (a) withholding patronage, labor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use or work on particular materials, equipment or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another". Ordinary picketing has the effect of causing third persons—employees, would-be employees and customers—to cease dealing with the employer, but it is distinguished from the secondary boycott in that the latter is carried on away from the employer's premises and is directed at persons other than present or prospective employees. The simple or primary boycott is distinguished in that it is an agreement by the union workers, express or implied, not to patronize

<sup>118</sup> Pomeroy's Equity Jurisprudence, § 1907 *et seq.*; *Great Northern Ry. Co. v. Brosseau* (Dist. Ct. 1923), 286 F. 414. In *Boise Street Car Co. v. Van Avery* (Ida. 1940), 103 P. (2d) 1107, injunction issued under an anti-injunction law to prevent defendant union from infringing on plaintiff's bus franchise by running "courtesy cars".

<sup>119</sup> *The Oakmar* (Dist. Ct. 1937), 20F. Supp. 650; *The Losmar* (1937), 20 F. Supp. 887; *Plecit v. Local No. 37 of Int. Union of Bakery Workers* (Calif. Super. Ct. 1937), 4 U. S. Law Week 898; *Fansteel Metallurgical Corp. v. Lodge 667 of the Amalgamated Assn. of I. S. & T. Workers* (Ill. App. Ct. 1938), 14 N. E. (2d) 991; *Chrysler Corp. v. International Union, U. A. W. A.* (Mich. Cir. Ct. 1937), C. C. H. Labor Law Service, ¶ 16, 900; *Holland v. Minnehoma Oil U. Gas Co.* (Okla. 1939), 89 P. (2d) 764; *McNeeley & Price Co. v. Grabowski* (Pa. Ct. of Common Pleas, 1937), 1 Lab. Rel. Rep. 544.

<sup>120</sup> *The Losmar, The Oakmar, and McNeeley & Price Co.* cases cited note 119. An amendment to the Pennsylvania anti-injunction act makes it inapplicable to a labor dispute in which a sit-down strike has been called. 43 *Purdon's Penn. Stat. Ann.*, 1939 Cum. Pocket Part, § 206 d. See note 144, *infra*.

<sup>121</sup> Wis. Stat. (1939), § 111.06 (12).

a business with which they have a dispute. No modern common law case questions the legality of this latter means of labor warfare, and the Clayton acts and the anti-injunction laws have language exempting it from equitable restraint.<sup>122</sup>

A form of the secondary boycott occurs where a labor dispute exists between A employer and X union, and X union calls or threatens a strike against another employer B to cause B to cease having business relations with A. A frequent instance of this form of secondary boycott is the refusal by X union to work on a building (for B contractor) because of a dispute with the owner of the building or with another contractor (A). Another variant of this form is X union's advising B employer that its men will not handle, work or transport goods coming from or going to A employer with whom X union has a dispute. This has been called a material boycott. Closely related is a notice communicated by X union to B employer that its members will refuse to render services to A employer. The secondary boycott in its original meaning is applied when X union informs B that its members will not patronize him so long as he carries on dealings with A. Many common law decisions may be cited enjoining these activities,<sup>123</sup> but most of them may be explained on the ground that unlawful purposes were sought

<sup>122</sup> Note 10 *supra*; one-half or more of the anti-injunction laws expressly exempt the simple boycott from equitable process; e. g., Wis. Stat. (1939), § 193.53(f).

<sup>123</sup> Strike or threat of strike against B; Central Metal Products Corp. v. O'Brien (Dist. Ct. 1922), 278 F. 827; R. and W. Hat Shop, Inc. v. Sculley (1922), 98 Conn. 1, 118 A. 55; Swing v. American Federation of Labor (Ill. App. Ct. 1938), 18 N. E. (2d) 258 (refusal to perform services for A); Burnham v. Dowd (1914), 217 Mass. 351, 104 N. E. 841; W. A. Snow Iron Works v. Chadwick (1917), 227 Mass. 382, 116 N. E. 801; Picket v. Walsh (1906), 192 Mass. 572, 78 N. E. 753; United Union Brewing Co. v. Beck (Wash. 1939), 93 P. (2d) 772; Thacker Coal Co. v. Burke (1906), 59 W. Va. 253, 53 S. E. 161.

Refusal to work on same building on which plaintiff A has contract or which plaintiff A owns: Blandford v. Duthie (1925), 147 Md. 388, 128 A. 138; Erdman v. Mitchell (1903), 207 Pa. 79, 56 A. 327; Patterson v. Bldg. Trades Council (1902), 11 Pa. Dist. R. 500.

Refusal to handle goods going to or from A: Burnham v. Dowd; W. A. Snow Iron Works v. Chadwick; United Union Brewing Co. v. Beck; all cited *supra*; Purris v. Local No. 500 U. B. C. U. (1906), 214 Pa. 348, 63 A. 585.

Threat not to patronize B: Hopkins v. Oxley Stove Co. (C. C. A., 8th, 1897), 83 F. 912; Seattle Brewing & Malting Co. v. Hansen (C. C. A., 9th, 1905), 194 F. 1011; Wilson v. Hey (1908), 232 Ill. 309, 83 N. E. 928; Barr v. Essex Trades Council (1894), 53 N. J. Eq. 101, 30 A. 881; Fink & Son v. Butchers' Union No. 422 (1915), 84 N. J. Eq. 638, 95 A. 182.

or on the ground that other modes of labor warfare were so tortiously carried as to warrant a blanket injunction. Where the secondary boycott is concerned, there seems to be a noticeable tendency to include it within the terms of the injunction where unlawful picketing or intimidation has occurred. Another reason which occasionally appears for injunction in these cases is that these forms of the secondary boycott cause B to breach his contract with A.<sup>124</sup> Nevertheless, the preponderance of opinion at common law today in a case in which no unlawful purpose or method of warfare appears is that the activities here described will not be enjoined.<sup>125</sup>

Section 20 of the Clayton Act forbids injunction against ceasing to perform any work or persuading others not to patronize any party to a dispute, and it would seem that the activities described above are exempt from injunction.<sup>126</sup> But in the federal courts only employees in the immediate employment relation could claim the exemptions of § 20.<sup>127</sup> Consequently, X union which struck against B to cause cessation of dealings with A was obliged to claim the lawfulness of

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<sup>124</sup> Central Metal Products Corp. v. O'Brien; Ran W Hat Shop, Inc. v. Scully; Blandford v. Duthie, Thacker Coal Co. v. Burke; all cited note 123.

<sup>125</sup> Refusal to work on same building on which plaintiff A has contract or which plaintiff A owns: Gill Engraving Co. v. Doerr (Dist. Ct. 1914), 214 F. 111; Meier v. Speer (1910), 96 Ark. 618, 132 S. W. 988; McKay v. Retail Automobile Salesmen's L. U. No. 1067 (Calif. 1940), 106 P. (2d) 373; Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 98 P. 1027; John & R. Elec. Co. v. Bricklayers Local U. No. 1 (1917), 92 Conn. 161, 101 A. 659; Gray v. Bldg. Trades Council (1903), 91 Minn. 171, 97 N. W. 663; National P. Ass'n of Steam Fitters v. Cumming (1902), 170 N. Y. 315, 63 N. E. 369; Lunderdorf-Bicknell Co. v. Smith (1927), 24 Ohio App. 294, 156 N. E. 243.

Refusal to handle goods going to or from A: McKay v. Retail Automobile Salesmen's L. U. No. 1067; Parkinson Co. v. Building Trades Council; Cohn & R. Elec. Co. v. Bricklayers Local U. No. 1; all cited *supra*; Iron Molders Union v. Allis Chalmers Co. (C. C. A., 7th, 1908), 166 F. 45; Smith Metropolitan Co. v. Lyons (Calif. 1940), 106 P. (2d) 414; Smythe Neon Sign Co. v. Local Union No. 405 (Iowa, 1939), 284 N. W. 126; Crescent Plaining Mill Co. v. Mueller (St. Louis Ct. of Appeals, Mo., 1939), 123 S. W. (2d) 193; Bossert v. Dhuys (1917), 221 N. Y. 342, 117 N. E. 582.

Threat not to patronize B; Iron Molder's Union v. Allis Chalmers Co., *supra*; Pierce v. Stablemen's Union (1909), 156 Cal. 70, 103 P. 324; Lindsay & Co. v. Montana Federation of Labor (1908), 37 Mont. 264, 96 P. 127.

<sup>126</sup> Note 10, *supra*; see Illinois and federal cases cited notes 123, 124, and 125. Direct authority without the complicating factors of unlawful purpose and picketing is meager.

<sup>127</sup> See text at note 60, *supra*.

the activity under the common law and anti-trust laws. And under the latter X union was frequently enjoined.<sup>128</sup> Under the anti-injunction laws the legality of all these forms of the secondary boycott seems established. A labor dispute exists, and the defendants are parties who can claim the exemptions of the legislation.<sup>129</sup>

Occasionally these forms of the secondary boycott are carried on not by X union but by a related or allied union Y. Thus, Y union may refuse to work for B employer, or may refuse to handle goods coming from A employer, in order to compel B employer to cease having business relations with A. All this may be done indirectly to exert pressure on A to yield to the demands of X union which is related to Y union. The conclusions which were reached above remain the same although the situation now takes on the appearance of a sympathetic strike. However, the sympathetic or general strike, which is generally regarded as unlawful, is that which is called by a large number of unrelated unions having no common interest and which ties up industry generally.<sup>130</sup> On the other hand, if Y union is employed by A employer along with X union and Y union goes out on strike with X union in order to attain the latter's lawful objectives, this is entirely lawful. Any other conclusion would be to give to a single industrial union in a shop an advantage and privilege which would be denied to craft unions working in another similar shop.

<sup>128</sup> See text at note 141, *infra*.

<sup>129</sup> *Levering & Garrigues Co. v. Morrin* (C. C. A., 2nd, 1934), 71 F. (2d) 284 (X union refuses to work on buildings with plaintiff contractor); *Pauly Jail Bldg. Co. v. International Ass'n* (Dist. Ct. 1939), 29 F. Supp. 15 (refusal to work for contractors dealing with A or receiving A's products), *Southeastern Motor Lines v. Hoover Truck Co.* (Dist. Ct. 1940), 34 F. Supp. 390 (refusal to handle goods going to or from A); *International Brotherhood v. International U.* (C. C. A., 9th, 1939), 106 F. (2d) 871 (same); *United Electrical R. & Mach. Workers v. I. B. of E. Workers* (C. C. A., 2nd, 1940), 115 F. (2d) 488 (same); *Denver Local Union No. 13 v. Perry Truck Lines* (Colo. 1940), 101 P. (2d) 436 (refusal to work for employers contracting with A); *General Bottle Co. v. Oneto* (Sup. Ct. 1939), 12 N. Y. S. (2d) 348 (refusal to handle A's goods); § 206f of the Pennsylvania law (all forms).

<sup>130</sup> See *Colorado Wyoming Express v. Denver Local Union* (Dist. Ct. 1940), 35 F. Supp. 155; *Central Metal Products Corp. v. O'Brien* (Dist. Ct. 1922), 278 F. 827; *Auburn Draying Co. v. Wardell* (1919), 227 N. Y. 1, 124 N. E. 97; Wis. Stat. (1939), § 111.06 (2) (g) ("provided . . . nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employees in the same craft"); Rotwein on Labor Law, §§ 33, 34.

A form of the secondary boycott which has come into prominence and which deserves separate consideration is secondary picketing. This takes place where X union having a labor difficulty and strike against A employer pickets B employer to induce him to cease dealing with A. In nearly all the cases none of B's employees strike, and the common law rule, as well as the rule under the Clayton acts, is clear that injunction will issue at the suit of either A or B.<sup>131</sup> This result is reached because the common law courts are unwilling that means be used to draw non-combatants into the affray. Sometimes an added reason for the injunction is that the secondary picketing causes B to breach his contract with A. Frequently in the decisions, as is true of the secondary boycott cases generally, appear other factors which might of themselves be sufficient to sustain an injunction: unlawful purposes or violent conduct. Where B sues for injunction, it is to be noticed that a picketing without strike case exists as to him, and this is enough for equity to act at common law and under the Clayton acts.<sup>132</sup> Where some of B's employees strike, a case of picketing and strike to cause B not to deal with A exists, to be decided on an appraisal of the lawfulness of purpose. It is likely that the holding under the common law would be in favor of injunction because the purpose and method are part and parcel of an illegal secondary boycott<sup>133</sup>.

Under the anti-injunction acts there are many decisions decreeing injunctive relief on the ground that the legislation

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<sup>131</sup> A obtains injunction: *Meadowmoor Dairies v. Milk Wagon Driver's Union* (Ill. 1939), 21 N. E. (2d) 308; *Maywood Farms Co. v. Milk Wagon Drivers Union* (Ill. App. Ct. 1939), 22 N. E. (2d) 962; *Evening Times Printing & Publishing Co. v. American Newspaper Guild* (N. J. Ct. of Errors and Appeals, 1938), 124 N. J. Eq. 71, 199 A. 598; *Van Buskirk v. Sign Painters Local No. 1231*, (N. J. Ct. of Errors and Appeals, 1940), 14 A. (2d) 45; *United Union Brewery Co. v. Beck* (Wash. 1939), 93 P. (2d) 772; *Parker Paint & Wall Paper Co. v. Local Union No. 813* (1921), 87 W. Va. 631, 105 S. E. 911. *Contra*: *Pierce v. Stablemen's Union* (1909), 156 Cal. 70, 103 P. 324; *Smythe Neon Sign Co. v. Local Union No. 405* (Iowa, 1939), 284 N. W. 126.

B obtains injunction: *Evening Times Printing & Publishing Co. v. American Newspaper Guild* (N. J. Ch. 1937), 195 A. 378; *Carpenters and Joiners Union v. Ritter's Cafe* (Tex. Civ. App. 1940), 138 S. W. (2d) 223; *International Ass'n v. Federated Ass'n* (Tex. Civ. App. 1937), 109 S. W. (2d) 301. *Contra*: *Fortenbury v. Superior Ct.* (Calif. 1940), 106 P. (2d) 411.

<sup>132</sup> See text at notes 54 and 55, *supra*.

<sup>133</sup> Such is the case of *Carpenters and Joiners Union v. Ritter's Cafe*, cited note 131, *supra*.

does not exempt secondary picketing but leaves its legal status as at common law<sup>134</sup>. Recognition has been given that secondary picketing is different from ordinary picketing, and it is argued that the prohibition of the anti-injunction acts is against restraint on picketing of the employer (A) with whom the union (X) has a labor dispute. The terms of the anti-injunction laws are broad, however, and it is difficult to avoid the legislative command that no injunction issue against giving publicity to the facts involved in any labor dispute whether by patrolling or any other method not involving fraud or violence<sup>135</sup>. Consequently, there is a strong line of authority following a leading New York case<sup>136</sup> which denies injunction where there is a unity of interest between A and B. "Unity of interest" is found if B retails A's goods or services and thus gives economic aid to A in the latter's struggle with X union. It is likely that no unity of interest will be found if B is a private citizen and possibly if B does not retail the specific goods or service sold by A.<sup>137</sup> The New York decision spoken of further qualifies the privilege of secondary picketing by requiring that the signs and placards carried give notice that A's product is picketed

<sup>134</sup> A obtains injunction: *Yellow Cab O. Co. v. Taxicab Drivers Local U. Co. No. 839* (Dist. Ct. 1940), 35 F. Supp. 403; *Grandview Dairy v. O'Leary* (1936) 285 N. Y. S. 841, 158 Misc. 791.

B obtains injunction: *Muncie Building Trades Council v. Umbarger* (Ind. 1938), 17 N. E. (2d) 828; *Wiest v. Dirks* (Ind. 1939), 20 N. E. (2d) 969; *Canepa v. John Doe* (1938), 277 N. Y. 52, 12 N. E. (2d) 790; *People v. Bellows* (1939), 281 N. Y. 67, 22 N. E. (2d) 238 (criminal prosecution); *Silvergate v. Kirkman* (Sup. Ct. 1939), 12 N. Y. S. (2d) 505; *Weil & Co., Inc. v. John Doe* (1938), 5 N. Y. S. (2d) 559; *Mlle. Reif, Inc. v. Randau* (1937), 1 N. Y. S. (2d) 515.

Some of these cases are affected by unlawful purposes and by the fact that the picketing causes B to breach his contract with A.

<sup>135</sup> Note 15, *supra*.

<sup>136</sup> *Goldfinger v. Feintuch* (1937), 276 N. Y. 281, 11 N. E. (2d) 910 (B fails to secure injunction). Accord: *Consolidated Terminal Corp. v. Drivers, etc., Union* (D. of C., 1939), 33 F. Supp. 645; *Johnson v. Milk Drivers & Dairy Employees Union* (La. 1940), 195 So. 791. Accord where A fails to secure injunction: *Milk Wagon Drivers' Union v. Lake Valley F. Products* (1940), 61 S. Ct. 122, reversing 108 F. (2d) 436; *Wilson & Co. v. Birl* (C. A. A., 3rd, 1939), 105 F. (2d) 948; *Denver Local Union No. 13 v. Perry Truck Lines* (Colo. 1940), 101 P. (2d) 436; *Baillis v. Fuchs* (1940), 283 N. Y. 133, 27 N. E. (2d) 812; cases cited note 138 *infra*.

<sup>137</sup> See cases cited note 134, *supra*, particularly *Muncie Building Trades Council v. Umbarger*, *People v. Bellows*, *Canepa v. John Doe*, and *Silvergate v. Kirkman*.



against. But this qualification does not seem always to have been adhered to in later cases.<sup>138</sup>

The varying methods of labor warfare having been examined, there remains one circumstance which may cause any one of them to be enjoined apart from the operation of an anti-injunction law. If a labor activity violates the anti-trust laws or restrains inter-state commerce, it is subject to restraint.<sup>139</sup> Section 20 of the Clayton Act, being a part of the anti-trust law, forbids injunction against the activities itemized in such a way as to exclude the implication of exception in the case of a breach of the anti-trust laws. But the class of persons who were able to claim the exemptions of § 20 was so small<sup>140</sup> that injunctions issued freely against any form of labor warfare which restrained interstate commerce.<sup>141</sup> The secondary boycott (by strike or refusal to handle goods) was often enjoined because it restrained interstate commerce and because it was carried on by persons who could not claim the exemptions of § 20. Thus, it was not clear that the secondary boycott of this type was illegal in the federal courts apart from the anti-trust laws although the language of several of the decisions indicated disapproval.

The federal anti-injunction law was enacted to extend the exemptions from equitable restraint. So wide is the class of persons who can claim the exemption and so unequivocal and without exception are the prohibitions against restraint on the

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<sup>138</sup> *Manhattan Steam Baker, Inc. v. Schindler* (1937), 250 App. Div. 467, 294 N. Y. S. 783; *Davega-City Radio, Inc. v. Randau* (Sup. Ct. 1937), 1 N. Y. S. (2d) 514.

The qualification was followed in *Johnson v. Milk Drivers and Dairy Employee's Union*, cited note 136, *supra*.

<sup>139</sup> Cases cited note 141, *infra*; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1894), 62 F. 803; *United States v. Railway Employees' Dept. A. F. L.* (Dist. Ct. 1922), 282 F. 479.

<sup>140</sup> See text at note 60, *supra*.

<sup>141</sup> *United Mine Workers of America v. Coronado Coal Co.* (1922), 259 U. S. 344, 42 S. Ct. 570, later proceedings (1925), 268 U. S. 295, 45 S. Ct. 551 (picketing); *Loewe v. Lawlor* (1908), 208 U. S. 274, 28 S. Ct. 301, further proceedings (1915) 235 U. S. 522, 35 S. Ct. 170 (secondary boycott); *Duplex Printing Press Co. v. Deering* (1921), 254 U. S. 443, 41 S. Ct. 172 (secondary boycott); *Bedford Cut Stone Co. v. Journeymen Stone Cutter's Ass'n* (1927), 274 U. S. 27, 47 S. Ct. 522 (secondary boycott); *Aeolian Company v. Fisher* (C. C. A., 2nd, 1930), 40 F. (2d) 189 (secondary boycott); *International Organization, U. M. W. A. v. Red Jacket Consolidated Coal and Coke Co.* (C. C. A., 4th, 1927), 18 F. (2d) 839 (picketing); *United States Gypsum Co. v. Heslop* (Dist. Ct. 1930), 39 F. (2d) 228 (secondary boycott).

activities itemized that it is now settled that injunction will be denied against strike, picketing and the secondary boycott on the sole ground that they violate the anti-trust law.<sup>142</sup> However, statutory damages may yet be sought on the statement of a proper case.<sup>143</sup>

#### IV

A survey of the cases demonstrates that the rights and privileges of labor have expanded considerably during the past century. Gradually at first under the common law but with celerity during the last decade purposes and methods of labor warfare approved by the courts have increased in number and scope. At common law legal purposes were confined to better wages and hours and other closely related objectives. With the enlarged definition of labor dispute found in § 20 of the Clayton Act, it was labor's hope that the purpose of the closed shop and warfare carried on by unions and persons outside the immediate employment relationship should be exempt from injunction so long as the methods remained peaceful. When the courts restricted the exemptions of § 20 to a narrow group of persons within the immediate employment relation only and proclaimed that as to all others the common law and anti-trust act were applicable and basis for injunction, the response from labor was agitation for real anti-injunction legislation. For the main part the anti-injunction laws enacted by Congress and by some fifteen of the states are just that. The class of parties who may claim their exemptions and the definition of labor dispute are so broad as to protect a wide variety of purposes for which organizations outside the employment relation may wage labor warfare. Neither picketing without strike nor restraint of interstate commerce is circumstance sufficient for injunction to issue. Only purposes flagrantly unrelated to a union's welfare

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<sup>142</sup> *Milk Wagon Drivers' Union v. Lake Valley F. Products* (1940), 61 S. Ct. 122, reversing 108 F. (2d) 436 (secondary picketing of retail customers of plaintiff not enjoined though in restraint of commerce); *Wilson & Co. v. Birl* (C. C. A., 3rd, 1939), 105 F. (2d) 948; *Pauly Jail Bldg. Co. v. International Ass'n* (Dist. Ct. 1939), 29 F. Supp. 15; *Houston & North Texas M. F. Lines v. Local Union No. 886* (Dist. Ct. 1938), 24 F. Supp. 619. Earlier federal cases in the lower courts were *contra*: *May v. Dean* (C. C. A., 5th, 1936), 82 F. (2d) 554; *Lake Charles Stevedores v. Mayo* (Dist. Ct. 1935) 20 F. Supp. 698; *Fehr Baking Co. v. Bakers' Union* (Dist. Ct. 1937), 20 F. Supp. 691.

<sup>143</sup> *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 60 S. Ct. 982. This case contains a full exposition of what is restraint of commerce so far as union activities are concerned.

and methods of warfare of the secondary boycott type are enjoined; even then the courts have difficulty in avoiding the terms of the acts. When a case properly appears for injunction, the procedural requirements are detailed if not burdensome in the interest of preserving to the labor organization the utmost of its rights. It may be observed, too, that this legislation and decisions thereunder have had their influence in causing courts in jurisdictions without these laws to become more liberal in their attitudes toward labor warfare.

During the last two years a reaction has set in. Picketing without strike has occurred in some instances without justification, and the secondary boycott in its extreme manifestations has excited unfavorable comment. The sit-down strike and the spectacle of industry tied up by inter-union disputes have done much to stimulate a feeling that labor should not be uncurbed in its activities. As a result legislation has been enacted making the sit-down strike an unfair labor practice under the labor relations acts and declaring that the anti-injunction law shall have no application to it.<sup>144</sup> The secondary boycott in all or some of its forms has been made an unfair labor practice and subject to restraint.<sup>145</sup> The inter-union dispute has received special legislative attention and the anti-injunction law made inapplicable.<sup>146</sup> Picketing without strike has been limited in number of pickets,<sup>147</sup> and, more seriously for labor, a strike called without statutory notice has been made an unfair labor practice and misdemeanor.<sup>148</sup> Another type of restriction forbids labor warfare other than strike unless a majority of employees have voted for the strike.<sup>149</sup> Still another type forbids picketing

<sup>144</sup> Mass. Ann. Laws (Supp. 1937), ch. 150A, § 8; Mich. Laws 1939, Public Act No. 176, § 15; Minn. Laws 1939, ch. 440, §§ 11(c), 14; 43 Purdon's Penn. Stat. Ann., 1939 Cum. Pocket Part, §§ 206d, 211.6; Wis. Stat. (1939), § 111.06(2) (h).

<sup>145</sup> Minn. Laws 1939, ch. 440, § 11(f), 13, 14; Ore. Laws 1939, ch. 2; Wis. Stat. (1939), §§ 103.535, 111.06(2) (g).

<sup>146</sup> Ore. Laws 1939, ch. 2; 43 Purdon's Penn. Stat. Ann., 1939 Cum. Pocket Part, § 206d.

<sup>147</sup> Minn. Laws 1939, ch. 440, §§ 11(e), 14.

<sup>148</sup> Mich. Laws 1939, Public Act No. 176, §§ 9, 9a; Minn. Laws 1939, ch. 440, § 6; Wis. Stat. (1939), § 111.11.

<sup>149</sup> Ore. Laws 1939, ch. 2; 43 Purdon's Penn. Stat. Ann., 1939 Cum. Pocket Part, § 206d (where purpose is closed shop); Wis. Stat. (1939), §§ 111.06(2) (e), 103.62(3). The Oregon law was held unconstitutional in *American Federation of Labor v. Bain* (1940), 106 P. (2d) 544. Contrariwise, the Wisconsin court sustained its act; *Hotel & Restaurant E. I. A. v. Wisconsin E. R. Board* (1940), 294 N. W. 632.

unless a majority of the pickets are strikers.<sup>150</sup> Finally, amendment has been made to some of the labor relations laws so that no union or employee shall have their benefit if it or he has been guilty of unfair labor practices as defined.<sup>151</sup> These restrictions are all indications that the legislative mind is becoming impatient with some forms of union activity.

The lesson for labor is plain. If labor has striven long and arduously for legislative curbs on the labor injunction, to retain these benefits it must undertake to discipline its own ranks as to excesses which are not liable to equitable restraint. The inter-union dispute, trespasses of flagrant character, violence, and labor warfare for obscure reasons (including some picketing without strike cases) should be avoided. Otherwise a day may come when labor's gains will be lost in a reform not to its liking.

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<sup>150</sup> Minn. Laws 1939, ch. 440, § 11(d).

<sup>151</sup> Minn. Laws 1939, ch. 440, § 15; 43 Purdon's Penn. Stat. Ann., 1939 Cum. Pocket Part, § 211.10.1; Wis. Stat. (1939), §§ 111.01-111.20.



# KENTUCKY LAW JOURNAL

Volume XXIX

May, 1941

Number 4

Published four times a year by the College of Law, University of  
Kentucky: Issued in November, January, March, and May.

Subscription Price \$2.50 per year.....\$1.00 per number

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